# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 75

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SAFETY CAR HEATING AND LIGHTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

**PETITION FOR CERTIORARI FILED MAY 25, 1935**

**CERTIORARI GRANTED OCTOBER 14, 1935**

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1 In United States District Court, District of New Jersey

L-2526

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

*vs.*

THE SAFETY CAR HEATING AND LIGHTING COMPANY, PETITIONER-appellee

*Docket entries*

Mar. 5, 1931—Petition filed.
Mar. 17, 1931—Affidavits of Service and Mailing of Petition, filed.
Apr. 6, 1931—Stipulation extending time to Answer, filed.
May 19, 1931—Stipulation extending time to answer, filed.
May 19, 1931—Answer filed.
May 20, 1931—Notice of Fixing Place for Trial filed (Newark).
Oct. 15, 1931—Notice of Trial filed (November).
Mar. 17, 1932—Trial.
2 Apr. 6, 1932—Trial.
June 23, 1932—Defendant's Request for Special Findings of Fact and Conclusions of Law filed.
June 23, 1932—Motion for Judgment filed.
Dec. 4, 1933—Memorandum filed (Fake). See also L-2527.
Jan. 4, 1934—Testimony filed (2 books). See L-2527.
Feb. 19, 1934—Finding of Fact and Conclusions of Law filed.
Feb. 19, 1934—Rule for Judgment Final for Plaintiff for $48,967.34 and costs filed.
Feb. 21, 1934—Notice of Application to settle Findings of Fact and Conclusions of Law filed.
Feb. 27, 1934—Notice of Appeal filed.
Feb. 27, 1934—Petition for Appeal filed.
Feb. 27, 1934—Order Allowing Appeal filed.
Feb. 26, 1934—Citation issued.
Mar. 1, 1934—Citation returned, Service acknowledged. Copy filed.
Mar. 5, 1934—Plaintiff's costs taxed at $42.25 filed.
Apr. 16, 1934—Assignments of Errors filed.
May 4, 1934—Order extending Time to file Bill of Exceptions filed.
3 May 4, 1934—Order extending return day of Citation, filed.
June 7, 1934—Bill of Exceptions filed.
June 7, 1934—Stipulation and Order as to Exhibits filed.
June 7, 1934—Praecipe for Record filed.
June 7, 1934—Order extending return day of Citation. Copy filed.
July 6, 1934—Order extending return day of Citation. Copy filed.

4 In United States District Court

*Petition*

Filed March 5, 1931

The petition of The Safety Car Heating and Lighting Company respectfully shows to this Court:

1. Your petitioner is a corporation organized under, and existing by virtue of, the laws of the State of New Jersey, and a citizen of said State, having its office in New Jersey, at 21 South Day Street, Orange.

2. This suit arises under the laws of the United States, to wit, the Revenue Act of 1926.

3. On May 13, 1926, your petitioner, in accordance with the Acts of Congress relating to income taxes, filed with Edward E. Gnichtel, Esq., who was then Collector of Internal Revenue of the Fifth District of New Jersey, a return of its income for the calendar year 1925, which return showed a net income of One Million Four Hundred and Seventy-Three Thousand One Hundred and Eighty-Seven and 13/100 Dollars ($1,473,187.13) and a tax due the United States of America in the amount of One Hundred Seventy-Two Thousand Six Hundred Ten and 19/100 Dollars ($172,610.19), and said tax was duly paid by your petitioner in the following amounts and on the following dates:

| | |
|---|---|
| March 15, 1926 | $46,000.00 |
| June 15, 1926 | 36,852.89 |
| September 15, 1926 | 44,878.65 |
| December 15, 1926 | 44,878.65 |

5 4. Your petitioner is informed and believes that in preparing the said income-tax return it erroneously omitted to claim as a deduction from its gross income the sum of Five Hundred and Thirteen Thousand Four Hundred and Sixty-Eight and 5/100 Dollars ($513,468.05 and thereby overpaid the tax on the income by Sixty-Six Thousand Seven Hundred and Fifty and 85/100 Dollars ($66,750.85). The facts in relation to this overpayment are set forth in paragraphs 5 to 11, inclusive, of this petition.

5. Your petitioner for several years prior to March 1, 1913, and since that date, has been and still is engaged in the manufacture and sale of electric lighting equipment for illuminating railway passenger cars, wherein the electric current is generated by means of a dynamo under the car and operated by a belt from the axle. Prior to March 1, 1913, it owned many United States patents relating to such equipment and parts thereof. Amongst said patents which it owned, and prior to March 1, 1913, was United States Letters Patent No. 747686, which was issued to one John L. Creveling by the United States Commissioner of Patents on December 22, 1903, and by the said John L. Creveling duly assigned to the plaintiff herein by assignment executed August 1, 1907, which said assignment was duly

recorded in the United States Patent Office on August 6, 1907, in Liber L. 77, page 152. This patent covered a train-lighting system and was an indispensable instrumentality for protecting the storage battery under the car. So great was the need for such a device that the railroads would not purchase the equipment manufactured by your petitioner without such a system as covered by this patent.

6 6. After careful investigation in 1911 and 1912 your petitioner found that The United States Light & Heating Company, a corporation organized under the laws of the State of Maine (hereinafter referred to as the United States Company) having its plant at Niagara Falls, State of New York, and an active competitor of your petitioner, was manufacturing and selling train-lighting equipment embodying the inventions covered by United States Letters Patent No. 747686, described herein, thereby infringing the same to the great damage of your petitioner and making large profits on the sale of such equipment which belonged to your petitioner. Your petitioner ascertained that the United States Company had then sold over four thousand (4,000) equipments embodying the inventions covered by said Letters Patent, and on March 1, 1913, the fair value of the claim of your petitioner for damages and profits against the United States Company by reason of its infringing of your petitioners' patent was at least Six Hundred and Ninety Thousand Dollars ($690,000).

7. On January 15, 1912, your petitioner instituted a suit against the United States Company in the United States District Court for the Western District of New York, claiming that it was infringing United States Letters Patent No. 747686, and on February 15, 1915, a decree was entered in favor of your petitioner, adjudging its patent to be valid and that it was infringed by the United States Company, and referring the case to a Special Master to take testimony and report to the Court the amount of the damages suffered by your petitioner and the profits made by the United States Company, by the use of said patent, and for which it was accountable to your petitioner.

7 8. On October 6, 1924, the United States District Court for the Western District of New York entered judgment in said suit described herein in favor of your petitioner and against the United States Company for Five Hundred and One Thousand One Hundred and Eighty and 32/100 Dollars ($501,180.32), representing profits that the United States Company made by the use of said patent. Four Hundred and Thirty-Six Thousand One Hundred and Thirty-Seven and 41/100 Dollars ($436,137.41) of this judgment represented profits made by the United States Company from January 1, 1909, to and including February 28, 1913, and the balance of Sixty-Five Thousand and Forty-Two and 91/100 Dollars ($65,042.91) represented profits from March 1, 1913, to April 30, 1914.

9. After long negotiations, your petitioner compromised said judgment against the United States Company and accepted in full settle-

ment of said judgment the sum of Two Hundred Thousand Dollars ($200,000), which was paid on May 6, 1925. The expenses in connection with this suit amounted to Twenty-Three Thousand Six Hundred and Forty-One and 65/100 Dollars ($23,641.65), leaving a net amount of One Hundred Seventy-Six Thousand Five Hundred and Thirty-One and 95/100 Dollars ($176,531.95), which your petitioner received in settlement of its claim against the United States Company, the fair value of which, on March 1, 1913, was Six Hundred and Ninety Thousand Dollars ($690,000), making a loss of Five Hundred and Thirteen Thousand Four Hundred and Sixty-Eight and 5/100 Dollars ($513,468.05).

10. Your petitioner is informed and believes that the aforesaid sum of Five Hundred and Thirteen Thousand Four Hundred and Sixty-Eight and 5/100 Dollars ($513,468.05) is a proper deduction against its income for the calendar year 1925, and had the same been deducted when its income-tax return was prepared and filed, its income tax would have been One Hundred and Five Thousand Eight Hundred and Fifty-One and 34/100 Dollars ($105,851.34), or a difference of Sixty-Six Thousand Seven Hundred and Fifty and 85/100 Dollars ($66,750.85).

11. On March 9, 1929, your petitioner filed with the Collector of Internal Revenue for the Fifth District of New Jersey, to which office the tax was originally paid, a claim asking for the refund of Sixty-Nine Thousand Seven Hundred and Twenty-Nine and 18/100 Dollars ($69,729.18) of the income tax paid by your petitioner for the calendar year 1925 (a copy of said claim being attached hereto marked "Exhibit A"). Thereafter the claim was referred to the Commissioner of Internal Revenue and under date of March 21, 1930, the claim was denied and disallowed by the Commissioner.

12. That the income tax of your petitioner for the calendar year 1925 was paid to Edward E. Gnichtel, Esq., who was then Collector of Internal Revenue for the Fifth District of New Jersey, and the said Edward E. Gnichtel is no longer in office as such Collector, and because of this fact, this suit is brought against the United States of America.

*Wherefore* your petitioner demands judgment against the United States of America for the sum of Sixty-Six Thousand Seven Hundred and Fifty and 85/100 Dollars ($66,750.85), with interest thereon as follows, to wit: On Forty-Four Thousand Eight Hundred Seventy-Eight and 65/100 Dollars ($44,878.65) from December 15, 1926, and on Twenty-One Thousand Eight Hundred and Seventy-Two and 20/100 Dollars ($21,872.20) from September 16, 1926, together with the costs of this suit.

HENRY T. STETSON,
*Attorney for Petitioner.*

[*Duly sworn to by W. L. Conwell; jurat omitted in printing.*]

10 *Exhibit A to petition*

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE.

× Refund of taxes illegally collected

STATE OF NEW YORK,
*County of New York, ss.:*

Date received—5th Dist. N. Y., Collr. Int. Rev., March 9, 1929.

The Safety Car Heating & Lighting Company, by Walter L. Conwell, its President, 21 South Day Street, Orange, N. J.

1. Business in which engaged—Manufacturing.

2. Character of assessment or tax—Income Tax, 1925.

4. Reduction of Tax Liability requested (Income and Profits Tax), $69,729.18.

6. Amount to be refunded (or such greater amount as is legally refundable), 69,729.18.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks)—3–15–26; 6–15–26; 9–15–26; 12–15–26.

11 8. District in which return (if any) was filed—Fifth, New Jersey.

See statement attached

THE SAFETY CAR HEATING AND LIGHTING COMPANY,
(Signed) By WALTER L. CONWELL,
*President.*

Sworn to and subscribed before me this 8th day of March, 1929.
LOUISE KUHNER,
*Notary Public, Queens Co., Clerk's No. 1098.*

Certificate filed: Queens Co. Reg. 804 N. Y. Co. Clerk's No. 10 Reg. No. 2K4.
Kings Co. Clerk's No. 143 Reg. No. 2006.
Commission expires March 30, 1932.

Supplemental statement attached to claim for refund for calendar year 1925 on form 843 to be filed with the collector of the Fifth District, New Jersey

This company had a claim for infringement of one of its patents, practically all the infringements taking place prior to March 1, 1913, and on March 1, 1913, this claim was worth $690,000. (See affidavit of Edwin W. Hammer filed with the Commissioner of Internal Revenue in connection with the examination of the
12 income tax return of the taxpayer for 1925, symbols IT:AR:D:HL.).

Suit was brought against the infringer of the patent in 1912 and the suit was finally settled in 1925 and the net amount received by the taxpayer as the result of the settlement was $153,621.72, making

a net loss of $536,378.28, which at 13%, the rate of income tax for 1925, equals $69,729.18.

The taxpayer reserves the right to submit additional evidence in support of this claim and asks for a hearing on this claim.

13 In United States District Court

*Answer*

Filed May 19, 1931

Now comes the United States of America, and by Phillip Forman, United States Attorney for the District of New Jersey, and for its answer to the petition herein alleges and shows to the Court as follows:

I

Paragraph 1 of the petition is admitted.

II

Paragraph 2 of the petition is admitted.

III

Answering Paragraph 3 of the petition, defendant admits that petitioner filed an income-tax return for the calendar year 1925 as alleged. Defendant also admits that the amounts set out in said Paragraph 3 were paid on the dates alleged as income tax for the year 1925. Defendant denies, however, that said amounts were paid by the petitioner and further alleges that said tax return was a consolidated return and included therein a report of the net income and income-tax liability of Safety Export Company and Pintsch Compressing Company.

14 IV

Answering Paragraph 4 of the petition, defendant admits that plaintiff did not deduct from its gross income the claimed deduction of $513,468.05, and denies all other allegations contained therein.

V

Answering Paragraph 5 of the petition, defendant admits that petitioner for several years prior to March 1, 1913, and since that time has been, and still is, engaged in the manufacture and sale of electric lighting equipment for illuminating railway cars. Defendant also admits that prior to March 1, 1913, petitioner owned a patent relating to equipment for illuminating railway passenger cars, being United States Letters Patent Number 747686, which had been issued

to one John L. Creveling on December 22, 1903, and assigned to petitioner on August 1, 1907. Defendant also admits that said assignment was recorded in the United States Patent Office on August 6, 1907, Liber L. 77, Page 152. Defendant denies all other allegations contained in said Paragraph.

VI

Paragraph 6 of the petition is denied.

VII

Answering Paragraph 7 of the petition, defendant admits that petitioner instituted a suit against the United States Light and Heating Company on January 15, 1912, in the United States District Court for the Western District of New York, claiming that said company was infringing United States Letters Patent No. 747686. Defendant also admits that on February 15, 1915, a decree was entered in petitioner's favor adjudging its patent to be valid and that it was infringed by the said United States Light and Heating Company, and referring the case to a Special Master to take testimony and report to the Court the amount of the damages suffered by the petitioner. Defendant denies all other allegations contained in said Paragraph.

VIII

Answering Paragraph 8 of the petition, defendant admits that on October 6, 1924, the United States District Court for the Western District of New York entered judgment in said suit in favor of petitioner and against said United States Light and Heating Company for $501,180.32, and denies all other allegations contained therein.

IX

Answering Paragraph 9 of the petition, defendant admits that petitioner compromised said judgment against said United States Light and Heating Company and accepted $200,000.00 in full settlement of said judgment, which amount was paid to plaintiff on May 6, 1925. Defendant also admits that the expenses in connection with said suit amounted to $23,461.65, leaving a net amount of $176.531.95, which plaintiff received in settlement of its judgment against the said United States Light and Heating Company. Defendant denies all other allegations contained in said Paragraph.

16

X

Defendant denies Paragraph 10 of the petition.

XI

Paragraph 11 of the petition is admitted.

XII

Paragraph 12 of the petition is admitted.

WHEREFORE, defendant demands that plaintiff's petition be dismissed and that defendant have its costs herein.

PHILLIP FORMAN,
*United States Attorney for the District of New Jersey,*
*Attorney for the Defendant.*
By ISADOR S. WORTH,
*Asst. U. S. Attorney.*

17 In United States District Court

Statement of evidence and proceedings

Before Hon. GUY L. FAKE, U. S. D. J., Lefcourt Building, Newark, New Jersey, Thursday, March 17, 1932.

Appearances:

Messrs. Wall, Haight, Carey & Hartpence, by Hon. Thomas G. Haight, and Henry T. Stetson, Esq., for petitioner and plaintiff.

Phillip Forman, Esq., U. S. Attorney, by Oliver Randolph, Esq., Asst. U. S. Attorney, and R. P. Hertzog, Esq., Special Attorney, Bureau of Internal Revenue, for defendant.

*Colloquy*

Whereupon the following proceedings were had, to wit:

Mr. HAIGHT. If Your Honor please, there are two cases, one of them against Rogers, Collector, and the other one against The United States. The issues, so far as the facts necessary to support the cases, are the same. Consequently, it has been stipulated that the cases be tried together. The decisions are that a case brought against The United States under what is known as the Tucker Act, under which this suit is brought, is to be tried by the Court without a jury;
18 and the case against a collector is to be tried, of course, with a jury, unless the parties waive it. In order to try the cases together, and have them both tried by the Court, the parties have therefore stipulated and filed a written stipulation in accordance with the statute that the Rogers case be tried by the Court without a jury.

Whereupon Mr. Haight made the opening statement on behalf of the petitioner (which is omitted here as being unnecessary to a review of these cases on appeal); and thereupon the following proceedings were had, to wit:

Mr. RANDOLPH. Your Honor, I want at this stage, please, to present Mr. Hertzog, Special Attorney of the Bureau of Internal Revenue, of Washington, who will handle the case for the Government.

The COURT. Very well. He will be permitted to speak in the cause.

Mr. HAIGHT. We will just stipulate on the record the consolidation.

The COURT. Well, have you already filed a written stipulation?

Mr. HAIGHT. We have filed a written stipulation regarding the trial without a jury, as the statute requires, but I think we can enter on the record a stipulation regarding the consolidation.

The COURT. Well, I understand then from both of you that you now consent to a consolidation of the issues, and to try the cases together.

Mr. HAIGHT. Yes, sir, if Mr. Hertzog would rather have it; but I think we will present an order to you, that is the best way to handle it, of consolidation.

Mr. HERTZOG. Well, it is probably true that the cases are very closely interwoven, but at the same time it seems to me that the
19 suits are on somewhat different theories, and I don't know just how the thing will work out as to consolidating them. They involve in a sense the same question, yet they are on, it seems to me, different theories.

The COURT. Well, of course, there would be separate judgments entered.

Mr. HAIGHT. Yes.

The COURT. The consolidation amounts only to this, that you will try the cases together, and the Court will enter separate judgments.

Mr. HAIGHT. And the evidence in one shall be evidence in the other.

The COURT. And the evidence in one shall be evidence in the other, so far as it is pertinent, and then when the cases are all in, decisions will be separately entered.

Mr. HERTZOG. Well, there is probably no objection to that.

The COURT. If that is agreeable to you. Is that agreeable?

Mr. HERTZOG. That is agreeable; yes, sir.

Whereupon Mr. Hertzog made a statement on behalf of the defendants (which is omitted here as being unnecessary to a review of these cases on appeal); and thereupon the following proceedings were had:

Mr. HAIGHT. Now, it is admitted that the petitioner is a corporation of New Jersey.

It is admitted that the suit arises under the laws of the United States, to wit, the Revenue Act of 1926. I say it is admitted—I mean admitted by the petitioner.

*Offers in evidence*

Now, I offer in evidence four checks of the Safety Car Heating and Lighting Company which aggregate in amount $172,610.19, and which represent the original tax paid for the year 1925 to the

20 then Collector of Internal Revenue of the Fifth District of New Jersey, who was Edward E. Gnichtel.

May they be marked as one exhibit?

I offer those because the defendant does not admit that they were paid by this particular plaintiff. The checks show that they were.

Mr. HERTZOG. No objection.

(Received in evidence and marked "Exhibit P–1.")

Mr. HAIGHT. I now offer in evidence a copy of the income tax return of the Safety Car Heating and Lighting Company and its subsidiaries for the calendar year of 1925. We will substitute a photostatic copy of the original, if the Government prefers.

Mr. HERTZOG. We have a photostatic copy here.

Mr. HAIGHT. Well, I say, we will substitute the photostatic copy.

(Received in evidence and marked "Exhibit P–2.")

Mr. HAIGHT. Now, I state to your Honor that the return shows that we did not deduct from our income, gross income, of 1925, anything on account of the loss which we suffered in that year in respect to the claim which is in question here, and indeed that fact is practically admitted in each of the suits, by the defendant.

Now, then, it is admitted that on a re-audit of the return for the year 1925 the Commissioner of Internal Revenue asses'ed an additional tax in the amount of $22,162.07 against the petitioner, which amount was duly assessed in March 1930, and was paid by the petitioner to the defendant on April 7, 1930, together with interest in the amount of $5,284.59. That is admitted by paragraph 4 of the answer in the suit against Rogers.

21 Now, I offer in evidence the patent No. 747,686 to John L. Creveling, granted December 22, 1903, for improvement in systems of electrical regulation.

(Received in evidence and marked "Exhibit P–3.")

The COURT. Do the issues in both cases arise out of the income-tax returns for the year 1925?

Mr. HAIGHT. Yes, sir.

I now offer in evidence an assignment of the patent just referred to the Safey Car Heating and Lighting Company, the same being dated August 1, 1907, and recorded in the office of the Commissioner of Patents on August 6, 1907, in Liber L–77, page 152 of Transfers of Patents.

The assignment that I offer is a certified copy.

(Received in evidence and marked "Exhibit P–4.")

Mr. HAIGHT. The claim for refund and the rejection thereof, as alleged in the petition and in the complaint, is admitted in the answer, and a copy of the claim for refund is attached both to the petition and to the complaint. Therefore, I think that, so far as the formal proofs are concerned, is all that it is necessary for Your Honor to have.

Now, I am going to call Mr. Hulse, the engineer of the Safety Car Heating and Lighting Company.

Whereupon there was a discussion between the court and counsel as to the issues involved (omitted as being unnecessary to a review of these cases on appeal); and thereupon the following proceedings were had:

Mr. HAIGHT. At Mr. Hertzog's request, I offer in evidence a certified copy of the letter and computation of the Commissioner of Internal Revenue, assessing the additional tax, and I am going
22 to read one section or one paragraph from that schedule, which I think will give you the Government's contention quite concisely:

"It holds that a claim for damages for patent infringement consists in two parts: first, the infringement or tort, and, second, the damages. It frequently happens that a patent alleges an infringement which the court does not uphold. The fact that the taxpayer on March 1, 1913, believed under advice of counsel that its patents had been infringed and that the evidence ascertainable clearly established the infringement does not have the effect of an adjudication that a tort has been committed. The fact that there was a high degree of certainty as to recovery by the taxpayer does not alter the principle that there can be no recovery of damages from the infringement until a court of competent jurisdiction decrees that an infringement (tort) has occurred. Until such an adjudication takes place the taxpayer cannot be said to have an unconditional claim."

Now, the whole difference between us is whether or not we had a claim within the meaning of the law, the income-tax law, which was capable of being capitalized, and was capital, in 1913.

(Document above referred to received in evidence and marked "Exhibit P–5.")

Mr. HERTZOG. I would like to state that although that letter referred to by counsel states in substance the reason for the Commissioner's action in adding the amount received by the plaintiff in 1925 to its taxable income in that year, yet it must be understood that we do not desire to be bound by the reasons therein set forth.

Mr. HAIGHT. I think that instead of calling the witness I will offer some of the formal judgments and what not.

23 I offer in evidence a certified copy of the interlocutory decree of February 15, 1915, in the cause depending in the United States District Court for the Western District of New York, wherein the Safety Car Heating and Lighting Company was plaintiff and the United States Light and Heating Company was defendant. This decree adjudges valid the Creveling patent, which has been offered in evidence, and adjudges that it has been infringed, and that an junction issue and that there be an account taken of profits, gains, savings, advantages, and damages; and there is a reference to a Master to take such an accounting.

(Mr. Hertzog examines document produced by Mr. Haight).

Mr. HAIGHT. Can't we save some time by your looking those over later, Mr. Hertzog?

Mr. HERTZOG. I would like to enter an objection to the admission in evidence of this judgment, on the ground that it is immaterial and irrelevant, and incompetent, because it represents a judgment which was entered subsequent to March 1, 1913, and which therefore can have no bearing on the issues in this case. Now, the issues in this case are whether or not an amount received in 1925 represents income in that year, and also whether or not a loss was sustained in 1925, represented by the difference between the March 1, 1913 value of the claim for damages for patent infringement and the amount received in 1925. It is our position that anything which occurred between March 1, 1913, and 1925 is wholly immaterial and irrelevant, and has nothing to do with this case.

The COURT. If I should decide that issue, it would be in effect dispositive of all of the issues in this cause; and perhaps this is the best time to raise it, and go into the questions of law involved.

24 Mr. HAIGHT. May I suggest to Your Honor that if we should do this now we will probably waste a considerable amount of time. We have got our witnesses here. It won't take long to put them on. Then the matter will be briefed.

The COURT. Well, mark this, then, for identification at the present time.

Mr. HAIGHT. Well, may I make another suggestion? That it be received subject to your right to strike it out if you determine later that the main question in the case cannot be decided in accordance with the petitioner's contention. If you don't receive it, why it isn't in evidence; but of course it can always be stricken out by Your Honor as long as you haven't a jury.

Mr. HERTZOG. I have no objection if that is understood.

The COURT. Yes; it is understood then that you may at any subsequent stage of the case move to strike it out, and with that understanding the court receives it in evidence now.

(Received in evidence and marked "Exhibit P-6.")

Mr. HAIGHT. Now, I offer in evidence a certified copy of the mandate of the Circuit Court of Appeals for the Second Circuit, dated July 2, 1915, in the cause wherein the Safety Car Heating and Lighting Company was the appellee, and the United States Light & Heating Company was the appellant, affirming the decree of the United States District Court for the Western District of New York.

I presume you have the same objection to that.

Mr. HERTZOG. The same objection, the same reservation.

25 (Received in evidence and marked "Exhibit P-7.")

Mr. HAIGHT. I offer in evidence a certified copy of the decree of the United States District Court for the Western District of New York, dated July 20, 1915, in the cause therein pending wherein the Safety Car Heating and Lighting Company was plaintiff and the United States Light & Heating Co. was defendant, the same being the decree entered upon the mandate of the Circuit Court

of Appeals, which mandate has been offered in evidence and marked "Exhibit P–7."

Mr. HERTZOG. The same objection to that.

(Received in evidence and marked "Exhibit P–8.")

Mr. HAIGHT. I offer in evidence a certified copy of the decree of the United States District Court for the Western District of New York, in the cause therein pending wherein the Safety Car Heating and Lighting Company was plaintiff and the United States Light & Heating Company and others were defendants, the U. S. Light & Heat Corporation and Guaranty Trust Company of New York, as Trustee, were supplemental defendants, and certain other persons were intervenors, directing the entry of a judgment in favor of the plaintiff and against the defendant, United States Light & Heating Company, the defendant in the original suit, for $501,180.32, with costs, and adjudging that the same should be a lien against the property of some of the other defendants in the case.

You have the same objection to that?

Mr. HERTZOG. The same objection, the same reservation.

The COURT. Of course, in each of these instances, the ruling is the same.

26 (Received in evidence and marked "Exhibit P–9.")

Mr. HAIGHT. Now, I should state to your Honor that it is admitted in the pleadings that on January 15, 1912, the petitioner in this cause instituted a suit against the United States Light & Heating Company, claiming that it was infringing letters patent No. 747686, issued to Creveling, and heretofore offered in evidence.

Whereupon there was a further discussion between the Court and counsel of the issues involved (which is omitted here as being unnecessary to a review of these cases on appeal); and thereupon the following proceedings were had:

GEORGE E. HULSE, called and sworn on behalf of the petitioner, testified as follows:

Direct examination by Mr. HAIGHT:

Q. Mr. Hulse, where do you reside?

A. New Haven, Connecticut.

Q. What profession have you, if any?

A. Mechanical electrical engineer.

Q. And have you been in the employ of the Safety Car Heating and Lighting Company, the plaintiff here, for any period of time?

A. Thirty years.

Q. Thirty years?

A. Yes.

Q. What is your position with the Safety Car Heating and Lighting Company at the present time?

A. Chief engineer.

Q. How long have you been chief engineer?

A. Nearly twenty-five years.

27 Q. What is the main business of the Safety Car Heating and Lighting Company?

A. Manufacturing and selling apparatus for lighting cars.

Q. You mean by lighting electrically lighting?

A. At the present time, the main business is for electrically lighting; yes.

Q. And what was their business prior to March 1, 1913?

A. Their business was the same with the addition, at some time previous to that, of the manufacture and sale of apparatus for heating railroad cars and for lighting cars by means of Pintsch gas, and some other systems, which were particularly applicable to some conditions.

Q. Was there a period before March 1, 1913, when the main business of the company was that of furnishing electric lighting systems to railway cars and trains?

A. Yes; in the period from 1909 to 1913.

Q. And from 1913 on I presume it has been the same way?

A. Yes. The gas business has been gradually dropping off, and the electric lighting business increasing.

Q. Now, what was the electric lighting business as contradistinguished from the gas lighting business based on?

A. The electric lighting equipment which we sold, was based on the principle of driving a generator from the car axle and generating electricity for lighting in that way. The light for such periods as the car was standing still or operating at slow speed was obtained from a storage battery, which was charged while the car was in motion.

Q. And was that system based upon any patent?

28 A. That system was based on what was known as the Creveling Patent.

Q. I show you Plaintiff's Exhibit P–3, and ask you if that is the patent to which you refer?

A. Yes.

Q. That patent seems to have been acquired by the plaintiff company, according to Exhibit P–4, in August 1907. Does that gibe with your recollection?

A. Yes; as far as I know about the acquisition of the patent.

Q. And subsequent to the acquisition of that patent, did the company embark upon this business of building these electric lighting systems for the cars?

A. Yes; it had built a few prior to that, but the main part of the business was developed after that.

Q. And your systems were built in accordance with this Creveling Patent that has been offered in evidence?

A. Yes.

Q. Now, were you familiar at that time in 1909 up to 1913, with all of the car lighting systems then in use?

A. Yes; I was.

Q. And were you familiar with the patent situation, so far as it pertained to the lighting electrically of railway trains?

A. Yes.

Q. What position in the art, in the patented art, as well as in the commercial art, did this Creveling Patent hold?

A. I would say that it dominated both the patent situation and the commercial situation.

Q. Yes. Now, when you began manufacturing in 1909, was your business immediately successful or gradually so?

A. Well, for the first three or four years the number of equipments which were sold was limited.

Q. But did your business increase all the time?

A. Yes; it did, except for such disturbances to the business as occurred during the depression which we had. In other words, there were years in which——

Q. No; I am speaking now of from 1909 on up to 1913.

A. Yes. It increased.

Q. Now, then, perhaps his Honor would like to know, and if you can explain it very briefly, tell us the difficulties that confronted the engineers in attempting to light railway trains by electricity.

A. There were, of course, numerous difficulties that always arise when it is attempted to adapt mechanisms from the ordinary uses to railway service, but aside from those, the fundamental difficulties were these: This generator which supplies the current for lighting the lamps and charging the storage batteries, is driven by a belt from the car axle. Therefore the speed at which that generator turns around or revolves is proportion to the speed of the axle. In other words, if the generator is turning over 300 revolutions per minute, and the train is running twenty miles an hour, it is running sixty miles an hour, it is going three times as fast. The fundamental principles of generation of current by a dynamo electric machine are such that the output of the generator, if everything is left the same, varies directly with the speed. In other words, if the train were running sixty miles an hour, the current or the voltage would be three times as much as it would be at twenty miles an hour. That condition has to be avoided for several reasons. The first is that the generator, if it is made to give the right output at the slow speed, would not be big enough to stand the output at the higher speed. In explanation of that, I may say that a generator will give enough current to burn itself up if the power is furnished to turn it over at a higher speed. Therefore we have to protect the generator against itself during these changes in speed. Also those changes in speed and output would affect the lighting; at the higher output the lights would burn very brightly and at the lower output they would be dim. So you would get an uneven condition which would be highly unsatisfactory. Therefore it is necessary to provide some automatic regulation which will hold the generator output at some constant value, irrespective of the change in speed of the train. The fact that a storage battery is necessary also

complicates the problem. As I said before, the storage battery is a necessary part of the system because it supplies current when the train is running at a slow speed or standing still; in the same way that a tank, in a water system, would supply water if the pump was not running. The storage battery is rather a fragile device. If it is not treated correctly, its life is very short. It is necessary, therefore, to provide some regulation which will prevent overcharge of the battery. That is the thing that causes deterioration most rapidly. When you get a certain amount of current in the battery it is full; if you try to put more in after that, it overcharges it and causes it to deteriorate. That is the second thing which a regulator for a car-lighting system must do—it must protect the battery. The Creveling patent covers a system by which the output of the generator is regulated at a constant value against speed changes. It also provides regulation by which, when the battery is charged the proper amount, the charging current is cut off from the battery, although the system is left so that any lights which may be needed after the bat-
31 tery is cut off are supplied from the generator. That particular patent, the Creveling patent, called for current regulation. That is, the current output of the generator was regulated, and it was quite important because at that time in the art the current regulator was the only one which had been developed to a point where it was practicable for use on a railroad.

Q. Now, then, I understand that the art had been trying to solve these problems or difficulties which you have enumerated, but without success, sufficiently to commend them to commercial adaptation?

A. Yes, that is true.

Q. And that Creveling was the first to solve them?

A. Yes.

Q. And this patent devised a scheme which was commercially possible?

A. Yes; it did. It was embodied in a large number of devices which were sold commercially and used.

Q. I suppose after Creveling, there came more patents dealing with car lighting systems?

A. Yes, there are a large number.

Q. But the underlying basic one was the Creveling patent that has been offered in evidence here?

A. Yes, for current regulation.

Q. Yes. Now, then, after you began the manufacture and sale of these car lighting systems, built in accordance with the Creveling patent, did you ascertain whether others, or another manufacture, was building car lighting systems which you considered infringing the Creveling patent?

A. Yes, we knew that others were building systems which infringed this patent.

Q. Was there any particular one that was building them in considerable numbers?

32 A. The United States Light and Heating Company were the ones that built the largest number.

Q. Yes. And did you prior to March 1, 1913, make an investigation of the systems which were being manufactured by the U. S. Light and Heating Company?

A. Yes, those systems which were in use on cars, were generally accessible for examination.

Q. You did examine them?

A. Yes.

Q. And did you examine the extent to which they were being put out by this company?

A. Well, we were familiar with the number that had been sold, and of course we knew approximately what they were putting out, because the car lighting business was a rather narrow business; it wasn't what you might term an open market. The different manufacturers knew about what was being sold by the other companies.

Q. Was one of your former officials connected with this United States Light & Heating Corporation?

A. Mr. D. W. Pye, who was vice-president of our company, became president of the United States Light & Heating Company.

Q. Did you before March 1, 1913, meet this system which was being put out by the United States Light & Heating Company in competition with your systems?

A. Yes.

Q. With any particular large consumer?

A. The Pullman Company was the largest consumer at that time, and we found the competition in trying to sell them.

Q. Now, had you made any investigation at that time, before March 1, 1913, as to how many of these equipments had been sold to the Pullman Company by the United States Light & Heating Company?

33 A. Yes.

Q. What did you figure, based upon your observation and computations, was the number of equipments that had been sold to the Pullman Company by this United States Light & Heating Corporation prior to March 1, 1913?

Mr. HERTZOG. Just a minute. I object to the question on the ground that this witness is not competent to testify to the number of equipments sold by some other concern. I don't think it is the best evidence of the number of such equipments.

THE COURT. Well, he may testify as to the number that he did have actual knowledge of.

A. Well, our investigations, or my investigations, indicated that they had sold the Pullman Company at least 4,000 equipments.

By Mr. HERTZOG:

Q. From what course did you get this information?

A. We, of course, had pretty good knowledge of what was sold to the Pullman Company, because their transactions are more or less

open. At least, there is the formality of getting prices from every company when a number of equipments are bought. Besides that, there is various data published in connection with it, for instance, the Association of Railway Electrical Engineers, which gives the number of equipments installed. In the case of the Pullman Company, we knew that we had sold them a few, we knew that the other companies i nthe busjness had sold them practically none. So that by a process of elimination, we knew that a large percentage——

34 Mr. HERTZOG. Just a minute.

THE COURT. I will allow it.

A. (Continuing.) —— of equipments bought by Pullman were bought from the United States Light & Heating Company.

Continuation of direct examination by Mr. HAIGHT:

Q. Were you——

Mr. HERTZOG. Just a minute. If your Honor please, I move to strike the witness' testimony as to the number of equipments sold by the United States Light & Heating Company. I don't think the testimony of this witness is the best evidence of the number sold by some other company. He has no access to their records, and I think it would be at most hearsay evidence, and certainly not binding.

Mr. HAIGHT. Well, why waste any time over it, Mr. Hertzog? The Master found that they sold over 4,200——

Mr. STETSON. Over 5,000.

Mr. HAIGHT. Yes, but before March 1, 1913, they sold, according to his findings, over 4,200. But let me ask Mr. Hulse this:

Q. Were you continually bidding on the requirements of the Pullman Company?

A. Yes.

Q. Did you get any of them?

A. We got very few.

Q. Yes.

35 A. I think it was about 250, in four years.

Q. You knew exactly what you got, didn't you?

A. Yes.

Q. Did you know how many the Pullman Company were bidding for?

A. Yes.

Q. And did you know that no other company besides the U. S. Light and Heating Company was furnishing the Pullman Company?

A. We knew that they were not to any extent.

Q. Were you then able to approximate within a reasonable degree of certainty the number of lighting systems installed up until March 1, 1913, by this U. S. Light and Heating Company for the Pullman Company?

A. Yes.

Q. Were they also furnishing other railroads?

A. Yes.

Q. Did the 4,000 that you have mentioned take into account the equipments furnished to other railroads, or just to the Pullman Company?

A. That was just to the Pullman Company.

Q. Yes. Were you able to make a reasonable approximation of what they were selling to other companies?

A. Yes; we were. We had the same information about other concerns as we did about the Pullman Company—other railroads.

Q. About how many did you, on that information that you had, figure had been sold to other companies?

A. Well, I haven't refreshed my memory on that, but I would say that it would be in the neighborhood of a thousand.

Q. But that isn't accurate?

A. No.

36 Q. Now, then, did you determine, your company determine, to institute a suit against this U. S. Light and Heating Company?

A. Yes.

Q. For infringement, based on this Creveling patent?

A. Yes.

Q. When as respects the date of the institution of the suit, which was January 15, 1912, was the conclusion reached? I just mean approximately.

A. I would say it was the year before that.

Q. The year before that?

A. Yes; at least that.

Q. Now, during that year, another suit had been instituted against this company by your company on the same patent, hadn't it?

A. I believe a suit was instituted in the——

Q. Southern District of New York?

A. Southern District of New York, which was thrown out.

Q. And that suit had to be abandoned?

A. Yes.

Q. Because it was determined that you had sued the defendant in the wrong District?

A. Yes; that is true.

Q. And then you had to bring this new suit up in the District where the defendant had its principal place of business?

A. Yes; that is true.

Q. Which was the Western District of New York?

A. Yes. Their place of business was at Buffalo——

Mr. STETSON. Niagara Falls.

A. (Continuing.) Niagara Falls, N. Y.

Q. And that is in the Western District of New York?

37 A. It is.

Q. So far as you know?

A. It is.

Q. Now, then, that suit went to trial, I take it, before Judge Hazel; I mean the second suit?

A. Yes; the testimony was taken out of Court and it was argued before Judge Hazel.

Q. And eventually resulted in the decrees which have been offered in evidence?

A. Yes.

Q. Now, then, were you familiar at the time this second suit was brought and before March 1, 1913, with what you were selling, equipments made in accordance with the Creveling patent, for price I mean?

A. The price we were selling them for?

Q. Yes.

A. The price of what we call a complete equipment was $480. Along towards the latter part of the period the generators were equipped with ball bearings, which added more, and the selling price was $505 on subsequent equipments.

Q. Now, then, do not know what the profit was that your company was making on each equipment?

A. Yes; at that time the profit was——

Mr. HERTZOG. Just a minute. I object to the witness testifying what the profit was on the ground that that is not the best evidence.

Mr. HAIGHT. Well, lets see.

Q. You were the chief engineer of the company?

A. Yes.

Q. At that time?

38 A. Yes.

Q. And you had to do with the building of these equipments?

A. Yes.

Q. They were all built under your supervision?

A. Yes.

Q. Did you know what each one of them cost?

A. Yes; I knew at that time; and I have been able to refresh my memory since as to the cost at that time.

Q. And do you know what they were selling for?

A. Yes.

Mr. HAIGHT. Now, then, I submit that the man is competent to testify what the profit was.

The COURT. He is testifying from his own knowledge.

Q. What was the profit?

A. Approximately $120 per equipment.

Q. Now, then, did these systems continually require repair and replacements of parts?

A. Yes. Parts wore out or failed on account of accidents, so that the business of furnishing repairs was a substantial part of the car-lighting business.

Q. Were you able, prior to March 1, 1913, to figure what the average annual profit on repair and replacements of parts for each system was?

A. Yes.
Q. And did you make that calculation?
A. Yes.
Q. Prior to March 1, 1913?
A. Yes.
Q. And what was the profit—average annual profit—on repair and replacements of the equipments?
39 A. Approximately $15.
Q. Now, are you familiar with the number of cars equipped with your system of electrical car lighting that were in service in the years 1909 to 1913, inclusive? I mean approximately.
A. Yes, I have a memorandum here which I would like to consult in connection with that.
Q. I mean—did I say there cars—all cars.
A. All cars? Pardon me.
Q. Strike that out, please. Are you familiar with the——
Mr. HERTZOG. I don't think this witness should be permitted to testify from a card. He should testify from memory, if he can.
Mr. HAIGHT. Well, wait a minute. Let's find out what the question is first.
Mr. HERTZOG. Well, he is looking at a card.
Q. Are you familiar with the amount of equipments manufactured by the United States Light & Heating Company that were sold and outstanding in the years 1909 to 1913 inclusive? I mean year by year.
A. No, I haven't any——
Q. Strike that question out. Now, did the Safety Car Heating & Lighting Company license others to use the Creveling patent?
A. No.
Q. They maintained a complete monopoly so far as they could of the right to manufacture under the Creveling patent?
A. Yes; there were no licenses issued.
Q. Now, was the Safety Car Heating & Lighting Company
40 equipped to furnish these systems built under the Creveling patent to the 4,000 cars which you say were supplied with lighting systems by the United States Light & Heating Company, and the approximate thousand cars of various railroads which were equipped with lighting systems by the United States Light & Heating Company?
A. Yes.
Q. Could you have done so without any additional overhead or expense that didn't enter into the direct cost of manufacture?
A. Yes. We had all the sales offices that were necessary to make these sales and the other overhead is included in the price of the equipments on which the profit was calculated.
Q. If you had sold these 4,000 and the 1,000 or either of them, would your price per unit, your profit per unit, be any different

than the profit that you have testified to that you were then realizing on the systems that you yourselves were selling?

Mr. HERTZOG. Just a minute. I object to that. It seems to me that that is going a little too far.

The COURT. Read that question again, please.

Q. (Question repeated by the reporter.)

Mr. HERTZOG. It seems to me that that is going a little too far, for the witness to testify as to what might have happened if this or that had been done or had not been done. That is certainly not competent.

The COURT. I suppose it boils itself down to the question as to whether or not it would have added to the cost of production to sell more than to have sold less. Is that what it amounts to?

41 Mr. HAIGHT. That is it. I have asked him whether there would have been any additional overhead or any other expense other than the manufacturing expense. He says no. Now this question was just sort of a catch off; were there any other elements that entered into the question of whether their profits——

The COURT. Well, you may cross-examine if you desire, for the purpose of ascertaining the basis of the witness' knowledge.

Cross-examination by Mr. HERTZOG:

Q. Now can you say there wouldn't have been any additional cost to manufacture the additional four or five thousand equipments?

A. I didn't say that.

Q. Well, you haven't said it yet, but you have said there would have been no additional overhead.

A. That is a different question. I wasn't asked that.

Q. You said there would have been no additional overhead.

A. Well, I explained in one of my previous answers that the manufacturing overhead was included in the cost of the equipments on which the profit that I spoke about was based.

Q. Well, how do you know there wouldn't have been any additional expense?

A. If the number had been increased the manufacturing cost should have been decreased. The answers I have made so far have been directed to selling overhead and not to manufacturing overhead.

Q. You said, didn't you, that the profit would have been the

42 same if you had sold the additional equipments? How do you know? Or would the profits have been the same?

A. Well, there might have been a greater profit if the additional equipments had been sold, but the cost of selling them, the cost of selling those equipments, was already included in our cost of our sales offices. That is, it costs as much to lose an order as it does to get it.

Q. How do you know whether you would have gotten any more for the equipments or whether you would have gotten the same amount?

A. I haven't said that yet.

Q. You said the profit would have been the same. How do you know that you would have received the same amount per equipment?

THE COURT. Now, go back to the question that Judge Haight asked him. Repeat that question, please.

Q. (Question repeated as follows: If you had sold these 4,000 and the 1,000 or either of them, would your price per unit, your profit per unit, be any different than the profit that you have testified to that you were then realizing on the systems that you yourselves were selling?)

The WITNESS. Of course, in answering that question, Is that the last question?

The COURT. Yes; you may answer that question.

By Mr. HAIGHT:

Q. That, of course, assumes that you wouldn't have raised your price.

43 A. Well, I was going to say right there, that in answering the original question as to the profit, I assumed that the price, the selling price, was the same.

Q. That is right. Now, would your profit have been any different if you had kept your selling price just the same?

A. The profit wouldn't have been any less and it might have been more.

Q. Now then, Mr. Hertzog's question brings up another line of inquiry that I want to direct your attention to. Was the price at which you sold these systems prior to 1913 in any way affected by the competition that you were subjected to by the United States Light and Heating Company?

A. Yes, the price was kept down on account of that competition.

Q. To what extent was it kept down, of your own knowledge? In other words, what were you prepared to have charged in addition to what you were charging for these systems had you not been compelled to meet the competition of the United States Light and Heating Company?

A. The answer to that is an opinion on my part. I would say that if this competition had not existed, the selling price would have been raised twenty-five dollars without any question.

Q. Well, did you know that at that time? Was it discussed?

A. Oh, yes; that was a continual subject of discussion.

Q. Now, do you know whether the sales by the United States Light and Heating Company to the Pullman Company were in any way influenced by the price that they were charging for their systems?

44 A. Well, we got reports that came back, as to why we didn't get the business, saying that the price was too high. We experienced that with a large number of customers.

Q. Now, Mr. Hulse, for the purpose of having something definite in the record, are you able to give us, taken from your actual

records, the sales of equipment by your company in the years 1909, 1910, 1911, 1912, and 1913?

A. Yes, sir, I can give you that.

Q. I think it would be well to have that on the record. Give us those, will you, please?

Mr. HERTZOG. Are these sales, may I ask, for this particular patent?

Mr. HAIGHT. Yes.

Mr. HERTZOG. Sales of the system covered by this patent.

A. 1909, and the years before that, 227. Our sales up to 1909 amounted to just a few equipments, seven or eight, I believe.

Q. 227, did you say?

A. 227.

Q. Yes.

A. In 1910, 364. In 1911, 290.

Mr. HERTZOG. Two hundred and ninety thousand?

Mr. HAIGHT. No; 290.

The WITNESS. No; 290.

Mr. HERTZOG. Oh, these are just equipments?

The WITNESS. These are just equipments; yes.

45 A. (Continuing.) In 1912, 330. In 1913, 523.

Q. Now, can you tell us the amount of equipments taken from your actual records that were sold in those years, excluding 1913, to the Pullman Company?

A. Yes. In 1909 we sold them 10. In 1910, 127. In 1911, 50. None in 1912.

Mr. HAIGHT. I think that is all.

Cross-examination by Mr. HERTZOG:

Q. When did the Safety Car Heating and Lighting Company start in business?

A. It was in 1884 or 1888. I am not certain.

Mr. STETSON. 1889.

A. (Continuing.) 1889.

Q. What was their business originally when they started?

A. Well, my information is that the Safety Car Heating and Lighting Company was a combination of a company called the Safety Car Heating Company, which manufactured steam heat for railway cars, and the Pintsch Compressing Company, which sold Pintsch gas for lighting railway cars.

Q. When did you come with the company?

A. In April 1902.

Q. At that time what was their business?

A. The same business; steam heating and Pintsch gas for lighting.

Q. Were they operating under patents at that time?

A. Yes.

46 Q. When was the Creveling patent taken out? 1903, wasn't it?

A. 1903, I think; yes.

Q. Was he an employee of the Safety Car Heating and Lighting Company or did he have any connection with that company?

A. I think he was an employee at the time the patent was filed. He left the company, as I remember it, in April; on April 1, 1902.

Q. He left the company in April 1902, before he took out the patent?

A. Before the patent was issued; yes.

Q. When did the Safety Car Heating and Lighting Company acquire the patent from Creveling?

A. I believe the assignment was in 1907.

Q. Do you know how much was paid for the patent at that time?

A. I don't know. I don't know that anything was paid because—Well, I can't say this of my own knowledge, but it is probable that Creveling was working for the company with an agreement as to the assignment of patents.

Q. You are not familiar with that, though?

A. I am not familiar; I wouldn't want to say exactly what the conditions were.

Q. So far as you know, they didn't pay anything for it?

A. I don't know that they did.

Q. You don't know that they paid anything?

A. No.

Q. You don't think they did?

A. Well, I would rather not say either way.

47 Q. Well, he was working for the Safety Car Heating and Lighting Company at the time he invented this device?

A. Yes; I believe that is true.

Q. When did the Safety Car Heating and Lighting Company first start to manufacture systems under this patent?

A. Probably in 1909. That is, it was then that the manufacture started to any extent. The Safety Company and the other people had been working on this problem of electric lighting, but they had not received very much encouragement in the way of orders from the railroads up until 1909. At that time the business, to any large extent, originated. There were two or three reasons for it. One was that the Tungsten lamp was brought in, and the other was that the Pennsylvania Railroad opened their terminals and made a ruling that nothing but electrically lighted cars could go through the tunnels to New York.

Q. Did Creveling manufacture any systems under the patent prior to the assignment?

A. Not that I know of.

Q. Were the systems manufactured under this patent sold to anyone other than the railroads? Was it used in any place other than on trains?

A. No; not to any extent. As far as we were concerned, we never licensed anyone to use it, we never used it ourselves.

Q. Then it is furnished for trains, primarily?

A. Yes; it is particularly adapted to conditions under which lighting equipments on trains operate.

Q. Didn't the Safety Car Heating and Lighting Company also institute a suit against the United States Light and Heating Company on some other patents, on or before March 1, 1913?

48 A. Yes.

Q. Did they have any connection with the Creveling patent, for a lighting system?

A. Well, those patents covered mechanisms which were used in car lighting; yes.

Q. Those suits were instituted at about the same time as the suit against the same company on this Creveling device?

A. Yes; approximately.

Q. And you were also alleging that those other patents had been infringed by the same company, claiming damages, were you not?

A. Well, we instituted infringement suits. I don't know about the question of damages, or what we were claiming.

Q. Well, wasn't that what you instituted the infringement suit for, damages?

A. Well, as I understand it, an infringement suit is instituted primarily to stop the use of the patent device, and subsequently it may be found that some recovery is obtainable either by damages or profits.

Q. Well, these suits were also instituted for damages for past infringements, were they not?

A. Yes; they were instituted for the same reason that any patent suit is instituted, to stop the infringement and collect what can be collected.

Q. They were instituted for the same reason as the suits on the Creveling patent, were they not?

A. Yes; I should say they were.

The COURT. Take a recess at this time until two o'clock.

(Noon recess.)

AFTERNOON SESSION

49 GEORGE E. HULSE resumed the stand.

Cross-examination continued by Mr. Hertzog:

Q. Mr. Hulse, when did you first discover that the United States Light and Heating Company was making a lighting system similar to yours?

A. Well, it was discovered about as soon as they were sold, probably 1909.

Q. 1909?

A. 1909 or 1910.

Q. When was the first suit instituted against them?

A. I am speaking from memory only; I believe it was in 1911.

Q. 1911. It wasn't instituted then for about two years after they began making this system similar to yours. Why did you wait that long to institute suit?

A. Well, that is a question I don't believe I could answer, a question of policy in the officers of the company.

Q. Was any attempt made to stop the United States Lighting and Heating Company from making these systems prior to the institution of suit?

A. Well, they were notified, as the infringer always is notified in starting an infringement suit.

Q. When were they first notified, do you know?

A. I don't know the details of that.

Q. And you don't know why the Safety Car Heating and Lighting Company waited until 1911 before they instituted suit?

A. I am not sure of the 1911 date.

Q. The second suit was instituted in 1912, to the best of your recollection?

50 A. In 1912.

Q. You think the first one was instituted about a year previous?

A. Yes, I should say so; it might have been more.

Q. Well, now, when suit was instituted, of course, you thought that the Creveling patent had been infringed and that is why you instituted the suit?

A. Yes.

Q. And you thought you were entitled to damages?

A. Well, that is the object of a patent suit, to stop infringement and collect damages and profits.

Q. Wasn't that also true with respect to the other two suits that were instituted against the United States Light and Heating Company at the same time, infringement of patents numbered 881743 and 926518?

A. Yes, it was.

Q. Those other two suits were decided against you, were they not?

Mr. HAIGHT. I object. There is a question as to some other suits that had nothing at all to do with this suit at all, and the question is they were decided against you. Now, I don't care whether it is brought out, whether they were decided against us or not, but I think we have gone as far on that line of cross-examination as we should go.

The COURT. Yes. How is it material to the issue?

Mr. HERTZOG. Well, the point is, your Honor, that this witness has testified that he thought the patent was infringed and that they had suffered damages. Now, there is a considerable question here

51 as to just what the meaning of that is; even if they thought they were entitled to damages, that doesn't necessarily mean that they would get damages, if it actually infringed the patent, or that they had any just claim.

THE COURT. And so you are now attempting to bring out the fact that they instituted some suit that they lost?

Mr. HERTZOG. On patents against the same company at the same time to show the uncertainty of this particular suit.

Mr. HAIGHT. You see that wouldn't show anything. You might as well say that any lawsuit is uncertain because there are, I presume, as many patents decided against the patentees as those that are decided for them. Unless you go into each particular patent and show its position in the art and how extensively and nearly it is being copied by any infringement, comparison amounts to nothing. So this just leads us up a blind alley and leaves us there.

Mr. HERTZOG. Your Honor, please, this goes to the qualification of this witness. Now, he has stated that it is his opinion that they were entitled to damages, that their patent had been infringed in this particular case. He also stated that he was of the same opinion with respect to the other two suits. I certainly am entitled to question the witness and bring out the fact that even though he did think there was a certainty as to different——

THE COURT. Well, all you are attempting to show in the last analysis is that lawsuits are uncertain, like horse races. The
52 Court would assume that, I think, in regard to lawsuits generally, and I see no necessity of bringing out any evidence upon that point. As I gathered from your opening, the question will eventually resolve itself into a very simple one, and that is whether or not under the particular judgment with which we are dealing in this case it has retroactive effect, and whether or not we are permitted to deal with it as an item as of a date prior to March 1, 1913. So to load the record here with either successful or unsuccessful lawsuits for the purpose of demonstrating that lawsuits are uncertain seems to me to be unnecessary.

Mr. HERTZOG. Well, it would go, it seems to me, to the qualifications of this witness in connection with his testimony as to the amount of damages or as to the profits that this concern is losing.

THE COURT. Well, there is only one particular judgment that you are concerned with here, and that is the judgment set forth in the tax returns and referred to in the pleadings. Now, you are attempting to bring in another judgment of nonsuit or judgment for some defendant. As I understand, your object is simply to show that all of these things, lawsuits and the like, are uncertain. Of course they are.

Mr. HERTZOG. Of course, it goes further to show that the testimony of this witness is subject to the same qualifications.

THE COURT. That is a matter for argument when the testimony is in. I think you could well make an argument before the Court that a lawsuit is uncertain without having any evidence
53 upon which to base it. The Court would take judicial notice of that.

Mr. HAIGHT. Especially patent suits.

The COURT. Yes. I guess that is so of patent suits.

Q. Mr. Hulse, do you know, if at the time this suit was instituted or at any other time prior to recovery of the $200,000 in 1925, whether or not any amount was set up on the books as an asset?

A. No; I don't know that.

Q. You don't know it?

A. No.

Q. Now, you testified, I believe, that numerous difficulties were encountered in lighting trains in the early years and that the Creveling system, in your opinion, solved these difficulties; is that correct?

A. Yes.

The COURT. Well, now, do I understand we have got to go into the details of that patent suit further? I suppose there has been a decision, a written decision on it.

Mr. STETSON. Yes, sir.

The COURT. And the Court can read the decision.

Mr. HERTZOG. That is true, your Honor, but the question here, I think, we must put ourselves back to March 1, 1913, and we may forget what happened subsequent thereto, what was the ultimate outcome, look at the thing as it looked at that time.

54 The COURT. Well, that part of the argument we haven't gone into at all yet, and perhaps time might be saved if the Court went into it and made some ruling on it, but, as I understood it, the evidence was to go in here with practically no conflict, just certain basic facts that both sides desired to get into the record and then go into questions of law.

Mr. HERTZOG. The real question in the case, is whether an unliquidated contingent claim for damages in a patent infringement suit of this character on March 1, 1913, is such property as can be recognized in the determination of the tax resulting in the ultimate recovery.

The COURT. In other words, whether it was capital or income.

Mr. HERTZOG. Yes; whether the amount ultimately finally received is subject to allowance for credit based on the March 1, 1913, value of it.

Mr. HAIGHT. I think his Honor probably stated the thing as accurately and concisely as could be. The question is whether an unliquidated claim for patent infringement which existed before March 1, 1913, and for which a suit had been instituted before that date, but in which there was not a recovery, subsequent to that date, can be considered capital as soon as its value as of March 1, 1913, is determined.

The COURT. Well, now, what further facts do you need to produce here before you can go into a discussion of the law?

Mr. HAIGHT. We have several additional facts.

55 Mr. HERTZOG. The only question I can see is that if the Court should decide that such a contingent unliquidated claim can be valued on March 1, 1913, the question is what value

did it have. It seems to me that is really what the sum and substance of the plaintiff's testimony is.

The COURT. Let us get all the testimony in, gentlemen, that you want to get in, but don't encumber the record with a long recital of the incidents that were involved in patent suit unless you think it is absolutely necessary.

Mr. HERTZOG. Well, we don't intend to question the Court's decision that the patent had been infringed. The Court has decided that matter, and we don't intend to question the Court's decision. Our position, of course, is that on March 1, 1913, they did not know that the patent was going to be held valid and that there would be a holding of infringement.

(Question and answer repeated by the reporter.)

Q. If that is true, why were such systems not manufactured and sold under this Creveling Patent until approximately six years after the patent was issued?

A. As I explained before, there was no insistent or large demand for electric lighting equipment until 1909.

Q. I believe you stated that this patent was in your opinion being infringed by other companies prior to March 1, 1913. Will you please state what other companies, if you recall?

A. The Consolidated Car Lighting and Equipment Company was one of the companies involved.

Q. Can you think of any others?

A. Well, in 1911, I believe it was, the Gould Coupler Company were using a system which we thought was an infringement of the Creveling patent.

56 Q. What company?

A. The Gould Coupler.

Q. How many systems were manufactured and sold by these other concerns prior to 1913?

A. Well, the Consolidated Company had, prior to 1909, built and sold a fairly large number, but not involving the Creveling patent, and which were therefore not satisfactory, so that when they tried to supply the demand which came along in 1909, they were compelled to adopt the Creveling system; but the sales by the Consolidated Company after 1909 were comparatively small. To make an estimate I don't believe they sold over 500 equipments.

Q. Who is that?

A. The Consolidated.

Q. How about the Gould Coupler, about how many were sold by it?

A. Speaking of the period—

Q. Prior to March 1st.

A. My estimate, the best I could make, around 1,500 equipment.

Q. You, of course, also made an investigation with respect to this?

A. No; I think that is high. I think a thousand would be a closer estimate, prior to 1913.

Q. In other words, as a result of your investigation, you ascertained that about 500 systems, which in your opinion were similar to the Creveling device, were sold by the Consolidated Car Lighting and Equipment Company and about 1,000 by the Gould Coupler Company prior to 1913?

A. Yes.

Q. Was suit instituted against these companies for infringement?

57 A. Yes; suit was instituted against Gould later. Suit was never instituted against the Consolidated Company, because they stopped using the patented device after the injunction was handed down.

Q. You didn't institute any suit for damages for past infringement?

A. Against the Consolidated?

Q. Against either one.

A. We instituted a suit against Gould for infringement, damages, and profits.

Q. When was that instituted?

A. I think about 1915.

Q. And you say you did or you did not institute suit against the Consolidated Car Lighting?

A. No; we notified them, and they stopped using the device on the strength of the decision.

Q. That was in 1915?

A. Yes; approximately that time; might have been 1916.

Q. Didn't you suffer the same damages as a result of the infringement of this patent by the Consolidated Car Lighting and Equipment Company as you did in the case of the United States Light and Heating Company prior to 1913?

A. Yes; but my recollection is that a suit against the Consolidated Car Heating, Lighting and Equipment Company would not have been productive of any damages or profits.

Q. Why not?

A. Because they were not strong financially.

Q. You never attempted to get a judgment against them, did you?

A. Not to my knowledge.

58 Q. I believe you testified that in your opinion the profits realized per system was $120; is that correct?

A. Yes.

Q. To what time, what period, does that apply?

A. That applies to the period between 1909 to 1913, to the first of March 1913.

Q. Wasn't there some difference in price during that period?

A. Selling price?

Q. Yes.

A. No; it was maintained nearly constant.

Q. You testified that it was sold at $480 and then was later increased to $505?

A. Yes.

Q. When did that increase occur?

A. That occurred about the first of 1913.

Q. And it is your opinion, is it, that the cost of manufacture was approximately the same during that period?

A. During the whole period?

Q. Yes.

A. Within $15 or $20 an equipment.

Q. Was the cost increased to 1913?

A. The cost was increased by the addition of ball-bearings. In some cases there was a slight increase in the cost of the standard equipment.

Q. Wouldn't the profit be less then in 1912 than it was in 1909?

A. No; I think the figure of $120 covers it.

Q. That is an average figure?

A. Average, or it is probably the minimum profit.

Q. And you also testified that in your opinion you could have sold the system at $25 more than the selling price if the United States Light and Heating Company had not been selling its device?

59 A. Yes.

Q. Just what do you base that on?

A. Prices are determined by fair profit and competition. If there is no competition, which you will meet, any concern will fix their price to make a fair profit. The profit which I spoke of was not a fair profit.

Q. Did the United States Light and Heating Company sell their systems at the same price as the Safety Car Heating and Lighting Company?

A. No; they sold at a lower price.

Q. How much lower?

A. I cannot give you the exact figures on that.

Q. Now, wasn't there some difference of opinion as to the amount of damages that were being sustained by the Safety Car Heating and Lighting Company if the patent infringement suit were upheld?

The COURT. Do I understand that all these issues we are discussing now were involved in the Master's report when he fixed the amount of $500,000?

Mr. HERTZOG. What I want to bring out, Your Honor, is the fact that the profits this witness has testified to, which in his opinion were lost by the Safety Car Heating and Lighting Company, were considerably greater than the Master finally determined the loss to have been.

Mr. HAIGHT. Oh, they are two different things. The Master gave us the defendant's profits and what this witness is testifying to is loss of our profits; in other words, loss of our profits constitutes our

damage. As Your Honor knows, in a patent suit, the person
60 whose patent has been infringed may recover either profits or damages, depending upon—the profits of the infringer or his own damages—depending on which is larger.

The COURT. Well, which was it in this case?

Mr. HAIGHT. What the Master allowed was profits of the infringer and the amount of profits that he found, as it will appear when Mr. Haynes goes on the stand——

The COURT. Was the equivalent of your damages?

Mr. HAIGHT. No; it was in the neighborhood of $700,000 odd, and then he reduced the amount that we could recover because he said a certain portion of the profits of the defendant are not attributable to this invention but to something else. Now, then, what we were showing by this witness is what our damages were, and that is for the purpose of having an appraisal made of what the value of this claim was on March 1, 1913, irrespective of what the Master subsequently found, which the Court affirmed years later.

Q. At the time the Creveling patent was acquired, did you construct a new plant for the manufacture of these systems?

A. No.

Q. You used the same plant you had?

A. Well, up to 1912 we did not manufacture these in our own plant; they were made for us by contractors and assembled and sold. The plant was built in 1912.

Q. Who was making them for you, any particular concern or a number of concerns?

A. Well, three or four involved in making them.

61 Q. Who were they?

A. The Deihl Manufacturing Company in Elizabeth, New Jersey; Columbia Machine Works, Brooklyn; Spindler & Deringer, Jersey City; McLear Bros., in Brooklyn. There might have been some others involved in certain parts; I couldn't remember all of them.

Q. Now, did they manufacture a complete system or parts?

A. They manufactured such parts as we asked them to make.

Q. And you assembled them?

A. Yes.

Q. Wouldn't you have needed a larger assembly plant to assemble three times as many systems as you were then assembling?

A. Well, it takes three times as much work to assemble three times as many equipments; yes.

Q. Wouldn't you have needed a larger plant?

A. No; we had a plant at that time; it was not a manufacturing plant.

Q. Wouldn't you have needed other and larger buildings?

A. No; I think the buildings we had at that time were ample to take care of what we would have had to have done in order to ship those equipments.

Q. Weren't you using the rest of your buildings for other purposes?

A. They were not all fully occupied.

Q. Do you know whether or not these other concerns who were manufacturing the parts for you could have manufactured three times as many equipments as they were then manufacturing?

62 Mr. HAIGHT. I object to that.

The COURT. How does that have any bearing on the issue?

Mr. HERTZOG. This witness has testified that they could have very easily produced and sold the four thousand equipments that were sold by the United States Light and Heating Company, in addition to the equipment sold by themselves, without any additional overhead.

The COURT. What concerns me about all that is, who is able to prophesy about it?

Mr. HERZOG. That is what I am interested in, to try to show it is almost impossible, couldn't be done.

Q. Well, that is all.

Redirect examination by Mr. HAIGHT:

Q. Mr. Hulse, just one or two questions. I understand that up until March 1913 the only competitors in this electric car lighting business besides the United States Light and Heating Company was the Consolidated Company and the Gould Coupler Company.

A. Yes; that's right.

Q. You considered that the Consolidated Company, the apparatus that they were putting out, infringed the Creveling patent?

A. Yes.

Q. But you did not bring a suit against them while you had a suit pending against the United States Light and Heating Company?

A. No; we did not.

Q. You waited until after that was over?

63 A. We never brought a suit against the Consolidated.

Q. I understand. But you waited until after that was over?

A. Yes.

Q. Then when the Creveling patent was adjudged to be valid and infringed by the United States Light and Heating Company, the Consolidated Company abandoned further infringement?

A. Yes; they offered—I think they had an order from the B. & O. Railroad for a number of equipments, and they were compelled to forego that order because they could not furnish these equipments. They would not furnish them as originally planned because they knew they infringed the Creveling patent, and they offered to substitute a prior art substituted and the Railroad refused to take it.

Q. Now, then, the Consolidated Company, I gathered from your cross-examination, was not a competitor of any particular moment.

A. No; they had enjoyed considerable business in the early days, but their apparatus was not particularly well suited to the work, and they gradually faded out of the picture.

Q. Could they have taken with the apparatus that they were putting out and their facilities for putting out apparatus, together with the price at which they were offering it, any substantial part of these four thousand equipments which were sold, as you say, by the United States Light and Heating Company to the Pullman Company?

Mr. HERTZOG. I object. I don't think the witness has shown any qualification to testify as to what these other companies might have done.

64 Mr. HAIGHT. Let us find out if he knows.

The COURT. Do you know?

The WITNESS. I don't think I could answer that question. I don't think I know.

Q. Well, how many did they put out between 1909 and 1913? Did I understand you to say 500?

A. Five hundred was my estimate; yes.

Q. Now, then, how about the Gould Coupler Company? You did sue them, didn't you?

A. Yes.

Q. And their apparatus was held not to be an infringement?

A. Yes.

Q. But that was sometime subsequent; that decision came down sometime subsequent to the decision in the United States Light and Heating Company case?

A. Yes; a year or more after.

Q. Now, then, the Gould Coupler Company was a competitor of yours, was it?

A. Yes.

Q. How did their sets compare with yours in price?

A. My recollection is that their prices were equal or higher than ours.

Q. They were considerably higher, weren't they?

A. As a general thing, they probably were.

Q. Didn't you tell me so a little while ago that they were higher? Maybe I misunderstood you. I understood you to say they were higher.

A. Yes; they were higher. I say it now.

Q. All right, don't let's have any hesitancy about it. They were higher. Do you know whether they were bidding, together

65 with you and the United States Light and Heating Company, for the Pullman business during this period of time?

A. I am not sure of those sales.

Mr. HERTZOG. Don't let's have any guesses here.

Q. If it is a guess, it won't amount to anything.

A. I don't know.

Q. You don't know. Now, you said there was a variation between cost from 1909 to 1913; leaving out the ball-bearing proposition, was the variation of any moment at all?

A. It was a matter of $10 or $12 in $350.

Q. Well, a matter of $10 or $12 would make quite a difference in profit. Now, how big was the variation in cost in those years, leaving out the ball bearings?

A. $10 or $12.

Q. Now, then, when the ball bearing came along, you increased your price to take care of the ball bearing?

A. Yes.

Q. And when you gave the figure of $120, do I understand that was an average figure over this period of time which took care of all these variations up and down of cost?

A. I would say it was; I think the maximum cost on a plain bearing equipment was $370, which would give a profit of $110, and the minimum cost, as I remember it, was $360.

Q. What would that profit be?

A. That would be a profit of $120. On the ball-bearing equipment——

66 Q. I don't care anything about the ball bearing. You didn't get the $120 if there was one time it was $110 and another time $120. I want the average.

A. Well, the average is $120.

Q. The average was $120?

A. Yes.

Q. Well, did you ever get it higher than $120?

A. It must have been higher if the average was $120.

Q. Now, then, are you in a position to state and were you in a position in 1913 to know whether, if the United States Light and Heating Company had not sold to the Pullman Company, that you would have been able to furnish the equipment for them?

A. You mean physically able to furnish it?

Q. No; you said you were physically able, but could you have gotten the business?

The COURT. How can he answer that?

Mr. HAIGHT. I am going to find out. I think he can answer it.

The COURT. That seems to me to call for prophetic vision, that none of us is possessed of. I think he can show the facts existing at that time from which a conclusion might be arrived at.

Mr. HAIGHT. That is what I am trying to get at. Now, just bear with me and see what the witness has got to say on it. If he hasn't got anything to say on it that amounts to anything, then, of course, this testimony doesn't amount to anything.

A. Well, our relations with the Pullman Company were

67 very good as far as selling them materials were concerned, because they had been customers of ours for years, both for steam heat equipments and Pintsch gas equipment, so that we were in a position to sell them, and our financial standing or our com-

pany standing was higher than any of the others because we had been in business——

The COURT. Well, as bearing upon the merits of the equipment, yours as compared with your competitor, what have you to say as to its durability, its efficiency and operation, its cost of maintenance?

The WITNESS. Our equipment was a better equipment than theirs.

The COURT. In all of the particulars I have just mentioned?

The WITNESS. Had a better capacity, the generators were larger.

The COURT. Cost of maintenance?

The WITNESS. Cost of maintenance necessarily would be lower with a better equipment.

The COURT. Do you know anything about those facts as to whether they were or not as you just stated by actual comparison?

The WITNESS. Well, I know this, that the equipments which we sold them at that early time are in better condition than the ones that were sold by the U. S. L. Their equipment had a lower capacity and they still have them in service, but they are continually in trouble on account of that lower capacity.

Q. Do you know whether, after the U. S. L. went out of business or stopped selling these infringing articles, you got the Pullman business?

68 A. Yes, we got the Pullman business, three or four years after the decree or the suit was settled.

Q. After the injunction, you mean?

A. Yes; after the injunction.

Q. Well, do you know why you didn't get it immediately?

A. No; I don't.

Q. Who did get it, if anybody?

A. The U. S. L. got the Pullman business.

Q. Now, the U. S. L. has been enjoined, they cannot go any further. Now, then, after that happened, did you get the business that the U. S. L. had theretofore been doing?

A. Not immediately after the injunction; no.

Q. Did the U. S. L. get it modified?

A. Yes.

Q. Then later you got the whole business?

A. Yes.

Q. That is all.

Recross-examination by Mr. HERTZOG:

Q. Did you at any time have a monopoly on the business of the Pullman business in these lighting systems?

A. Well, later we sold them all their equipment, I believe.

Q. Beginning when?

A. I think we got the whole business after 1920.

Q. Prior to that time though you sold it to them in competition with others?

A. Yes; that was in competition.

Q. Well, haven't you always got that business in competition with others, even after 1920?

69 A. Well, we haven't had much competition for the last four or five years.

Q. You haven't had much business either, have you?

A. Not as much as we would like. In 1928 and 1929 we had a very good business.

Q. That is all.

Mr. HAIGHT. Now, I have one short witness whom I would like to get away quickly.

JAMES FRANCIS FARRELL, called and sworn on behalf of the plaintiff-petitioner, testified as follows:

Mr. HAIGHT. The purpose of this witness is simply as to Poor's Manual for 1912 and 1913, and we then intend to offer Poor's Manual in evidence for the purpose of showing the financial condition of this United States Light and Heating Company to demonstrate that as of March 1, 1913, it was a solvent company engaged in a lucrative business; that therefore such claim as we have was a claim against a solvent company, being one of the elements that we think must be taken into consideration in determining whether this claim had a value as of March 1.

The COURT. The best evidence as to insolvency would be its own books.

Mr. HAIGHT. I am going to prove that through Poor's Manual.

The COURT. Is there any reason why it cannot be admitted?

Mr. HERTZOG. No dispute as to Poor's Manual for what it shows. We don't dispute the book.

70 The COURT. Are you going to dispute the question as to whether or not the corporation just referred to was a solvent corporation on the first day of March 1913?

Mr. HERTZOG. No; not March 1, 1913.

The COURT. That is what you wanted, wasn't it?

Mr. HAIGHT. Yes; and that it was making money at that time.

The COURT. And that Poor's Manual shows that it was making money at that time?

Mr. HERTZOG. I will agree that Poor's Manual, whatever Poor's Manual shows, is probably the correct situation.

Mr. HAIGHT. Then we will consider that either side may refer to Poor's Manual as to the financial condition of this company in 1912 and 1913 with the same force and effect as if the Manual were proved and offered in evidence and as if it were an established fact.

Mr. HERTZOG. Yes. This applies to Poor's Manual for any later years that either side want to refer to it for, as to the condition of this company or any other company that may be involved in this controversy.

71 DELOS G. HAYNES, called and sworn on behalf of the petitioner-plaintiff, testified as follows:

Direct examination by Mr. HAIGHT:

Q. Mr. Haynes, you are a member of the bar?

A. Yes, sir.

Q. And engaged in patent and trade-mark practice?

A. Yes, sir.

Q. How long have you been engaged in patent and trade-mark law?

A. I was an Assistant Examiner in the United States Patent Office in 1910–11–12 and since that time have been practicing patent and trade-mark law. I was admitted to the bar early in 1913.

Q. And since you left the Patent Office have you had anything to do with the patent business of the Safety Car Heating and Lighting Company

A. Yes, sir; I have been one of the patent counsel for the Safety Company practically continuously since the latter part of 1912.

Q. Did you have anything to do with the institution and with the carrying through of the suit brought by the Safety Car Heating and Lighting Company against the United States Light and Heating Company in the Western District of New York?

A. The suit was filed before my connection with the Safety Company began, but I took an active part under the direction of elder counsel in the prosecution of the principal suit and of the subsequent accounting in the suit.

Q. Now, it appears that there was one suit that was started
72 in 1911 or before the suit that was started in the Western District of New York. Did you know anything about that suit?

A. I knew there was such a suit, but I took no part in it.

Q. And that suit, do you know that that was discontinued because of the lack of jurisdiction over the defendant?

A. I know that that is what happened; yes.

Q. Now, after the decree was entered by Judge Hazel, holding valid and infringed the Creveling patent which has been offered in evidence here, 747,686, did you have anything to do with the accounting proceedings?

A. Yes; I was one of the two or three active counsel for the Safety Company throughout the entire accounting.

Q. And that accounting resulted in a report by a master designated by the Court?

A. Yes.

Q. Have you a copy of the report before you?

A. I have a verbatim copy of the report of the Master. This report is contained in plaintiff's brief on hearing on exceptions to the Master's report. It is a——

Mr. HAIGHT. Have you seen a copy of that, Mr. Hertzog? I am not going to offer it in evidence; I am going to have the witness testify to various features of it. I thought it would be far better to do it that way than dig it out of the Master's report.

The WITNESS. The Master's report is over 100 pages long.

Mr. HERTZOG. It seems to me that should be put in evidence and refer to whatever you think is material.

73 Mr. HAIGHT. I will be very glad to put it in evidence.

Q. You have before you a copy of the Master's report?

A. Yes, sir, contained in a larger volume, but this is a verbatim copy.

Mr. HAIGHT. And are you willing that I should offer that copy rather than a typewritten certified copy?

Mr. HERTZOG. Oh, yes.

Mr. HAIGHT. I offer the report that the witness produces.

Mr. HERTZOG. I wish to object to the report going in evidence, on the same ground as the objection to the judgment this morning.

The COURT. The Court's ruling is the same.

(Received and marked Exhibit P–10.)

Q. Now, before we get into the Master's report let me ask you one other question. Mr. Hertzog, while examining Mr. Hulse this mornink, spoke of some other suits that had been brought by the Safety Car Heating and Lighting Company against the United States Light and Heating Company on some other patents. Did the suit in the Creveling patent, 747686, or the accounting before the Master in any way concern those other suits?

A. No; they were entirely separate proceedings.

Q. Entirely separate proceedings and on different patents?

A. Yes.

74 Q. Did the subsequent settlement that was made by the Safety Company and the successor of the United States Light and Heating Company, in any way involve those suits?

A. No.

Q. Now, go back to the Master's report. What time does the Master's report cover?

Mr. HERTZOG. For the purpose of the record, I would like to have it understood that the same objection goes to all of this testimony subsequent to 1913.

The COURT. Yes.

Mr. HAIGHT. As stated on page 17 the accounting period is January 1, 1909, through April 30, 1914.

Q. Now, did that report divide itself into more than one period?

A. Yes, sir.

Q. Covered by years?

A. Yes, sir. The periods were not exact calendar years, however.

Q. Now, give us the number of equipments which the Master found that the defendant had sold by periods, giving us as near as you can the periods.

Mr. HERTZOG. It seems to me, if this document is in evidence, that that is merely a repetition of what the exhibit contains, and it seems to me it is unnecessary.

Mr. HAIGHT. It will shorten the thing a great deal. You will have it concisely.

75 The COURT. Yes; I think it is proper to bring it out in this way, because it emphasizes the points that the Court has to deal with.

A. As shown on pages 65 and 66 of the Master's report, "Period 1. The 18 months, January 1, 1909, through June 30, 1910. 256 stop-charge equipments and 107 taper charge equipments; a total of 363."

Q. Now, you needn't divide them between stop-charge and taper hereafter; just give us the total.

A. "Second period, the 12 months, July 1, 1910, through June 30, 1911, 1,574 equipment.

"Third period, the 12 months, July 1, 1911, through June 30, 1912, 1,558 equipments.

"The fourth period, the 12 months, July 1, 1912, through June 30, 1913, 1,160 equipments.

"The fifth period, the 10 months, July 1, 1913, through April 30, 1914, 405 equipments."

This is a total of 5,070—just a moment.

Q. The total is 5,060?

A. A total of 5,060.

Q. The Master made an award to the Safety Company; that is right, isn't it?

A. Yes, sir.

Q. Was that an award of the damages which the Safety Company had suffered or an award of the profits which the defendant had realized?

A. It was an award of part of the profits that the defendant had realized.

Q. What was the total amount of profits found by the Master to have been realized by the defendant in the period which you have mentioned?

A. $708,342.03. I am speaking from page 104.

Q. Now, then——

A. Not all of that was awarded.

76 Q. I understand that. How much of that did the Master not award to the plaintiff?

A. $207,161.71. I am speaking from page 105. This is 29.246 percent of the total as shown at the bottom of page 104.

Q. Now, the total amount then which he awarded to the plaintiff, as I take it, was $501,180.32?

A. Yes.

Q. Why did he deduct anything from the $708,342.03?

A. He stated that the entire profits were not attributable to the infringement and apportioned the portion that he considered attributable to the infringement and awarded that portion.

Q. Now, have you attempted to make from the Master's report an apportionment of what you have referred to as the fourth period, to show how much of the profits realized in that period by the defendant and awarded to the plaintiff were realized before March 1, 1913, and how much afterwards?

A. Yes, sir.

Q. Will you tell us what the apportionment is and the figures that you get, and, if Mr. Hertzog wants it, how you got them?

Mr. HERTZOG. Isn't that contained in the report?

Mr. HAIGHT. No; it has to be separated.

A. The fourth period runs from July 1, 1912, through June 30, 1913. In order to arrive at the profits for the period July 1, 1912, to March 1, 1913, or rather through February 28, 1913, profits allowed by the Master for this fourth period, namely, $125,882.30, are
77 prorated with the following result: The eight months from July 1, 1912, through February 28, 1913, are $83,921.53. The four months, March 1, 1913, through June 30, 1913, $41,960.77, making the total just mentioned, namely, $125,882.30.

Mr. HERTZOG. That proportion is fairly made on a time basis, is it not?

The WITNESS. This is made on a time basis. The defendant's books did not happen to begin or end an accounting period at March 1, 1913, so that the time basis appeared to be the fairest method of apportioning.

Mr. HERTZOG. Shouldn't the books show how many were sold prior to that time—the proportion; that is, the number of equipments sold in the eight months and four months?

The WITNESS. They would show the number of equipments, but they would not show the profits, because in order to get at the profits it would be necessary to prorate the various indirect items that are needed for determining profits, and those would not be shown except by prorating.

Mr. HERTZOG. Do you know what the number of equipments were during each period?

Mr. HAIGHT. Yes; he has given those.

Mr. HERTZOG. I mean for the four months and eight months. He has stated that those were shown by the books.

By Mr. HAIGHT:

Q. Now, then, Mr. Haynes, will you give us the profits as
78 found by the Master that the plaintiff was entitled to for these four periods, the first four periods, period by period, giving reference to the Master's report for the guidance of Mr. Hertzog?

A. I am speaking from pages 84 and 85 of the Master's report.

Mr. STETSON. That is the total. What Judge Haight asked was the amount that the Master finally awarded.

Mr. HAIGHT. Not the amount.

Mr. STETSON. Not the amount that he found as profits, but the amount he awarded, and it is on page 104 of the report.

Mr. HAIGHT. 104 and 105.

A. I don't find it given at those pages by periods.

Q. Now, give us, first, then, the total profits, period by period, in the first four periods as found by the Master.

A. Speaking from pages 84 and 85, first period, $46,783.50.

Second period, $208,476.60.
Third period, $242,542.79.
Fourth period, $177,915.45.

Q. Now, will you apportion those figures, period by period, the way the Master did and make the deduction which should be made because of the fact that the fourth period runs to June 30, 1913, and give us the result period by period.

A. First period, $33,101.20.
Second period, $147,505.53.

Mr. HERTZOG. Is this testimony coming out of that report or out of something else?

Mr. HAIGHT. This is the apportionment according to the way the Master did it.

79 A. (Continuing.) Third period, $171,608.73. For the relevant portion of the fourth period, $83,921.95.

Q. Now, then, the total amount, apportioned by the Master to the plaintiff for the fourth period was $125,882.30; is that right?

A. Yes.

Q. And the total for the fifth period was what—$23,082.56?

A. Yes.

Q. And the total of all of those figures that you gave and that I have referred to makes the total award of $501,180.32?

A. Yes.

Q. And the total adjusted up to March 1, 1913, is $436,137.41?

A. Yes.

Q. When was the Master's report filed, Mr. Haynes?

A. May 26, 1923.

Q. 1923 or '24?

A. '23.

Q. There were exceptions, I presume, filed to it by both sides?

A. Yes.

Q. Did you except to the finding of the Master that a part of the total profits were not attributable to the Creveling invention?

A. Yes.

Q. The matter was heard by Judge Hazel then on exceptions?

A. Yes.

Q. And resulted, I assume, by reference to the decree, which has been offered in evidence, in an affirmance of the Master?

A. Yes.

80 Q. And when was that, about?

A. The opinion was filed August 21, 1924; the decree was filed October 6, 1924. The latter document, I believe, is in evidence here.

Q. Now, was an appeal taken?

A. An appeal was taken by defendant.

Q. Now, do you know whether subsequent to March 1, 1913, and the entry of the interlocutory decree, adjudging infringement by the defendant, anything had happened to the United States Light

and Heating Company which in any way affected this suit or their recovery?

A. In July 1914 this——

Mr. HERTZOG. Just a minute. He merely asked you whether you knew.

A. The answer is yes.

Q. Now, tell us what did happen?

A. In July 1914, in a suit of the Central Trust Company of New York against the United States Light and Heating Company, in the United States District Court for the Western District of New York, Equity A–100, the Court appointed receivers for the United States Heat and Lighting Company.

Mr. HAIGHT. I offer in evidence certified copy of an order of the United States District Court for the Western District of New York, dated July 22, 1914, in the cause therein pending, wherein the Central Trust Company of New York was complainant and the United States Light and Heating Company was defendant, and in which
81 decree receivers for the United States Light and Heating Company were appointed, dated July 22, 1914.

Mr. HERTZOG. Same objection.

The COURT. Same ruling.

(Received and marked Exhibit P–11.)

Q. Now, Mr. Haynes, subsequent to the appointment of those receivers, do you know whether or not any of the assets of the United States Light and Heating Company were sold by the receivers?

A. The assets were sold by the receivers.

Mr. HAIGHT. I offer in evidence a decree of the United States District Court for the Western District of New York, dated June 2, 1915, in the cause just mentioned, ordering the sale of the property of The United States Light and Heating Company; also a report of the sale by the receivers, certified copy of the same is filed and a certified copy of an order of the said Court, dated July 31, 1915, confirming the sale. I suggest that they be marked as one exhibit.

Mr. HERTZOG. Same objection.

The COURT. Same ruling.

(Received and marked Exhibit P–12 a, b, and c.)

Mr. HAIGHT. I now offer in evidence a certified copy of a deed made by the receivers of The United States Light and Heating Company to U. S. Light and Heat Corporation, dated July 1, 1915, the deed reciting that it is made pursuant to the order of the Court in the before-mentioned cause.

82 Mr. HERTZOG. Same objection.

The COURT. Same ruling.

(Received and marked Exhibit P–13.)

Mr. HAIGHT. I now offer in evidence copy of mortgage, dated June 1, 1915, made by the U. S. Light and Heat Corporation, which I am hereafter going to refer to as the "New Company", to the Guaranty Trust Company of New York, as Trustee, to secure an issue

of bonds of one million dollars covering the property described in the deed which has just been offered in evidence.

Mr. HERTZOG. Same objection.

The COURT. Same ruling.

(Received and marked Exhibit P–14.)

Q. Now, after the Master's report had been confirmed by the Court, did the Safety Company file a supplemental bill bringing into the cause the purchaser of the assets of the United States Light and Heating Company, the old company, as well as the trustee under the mortgage which has just been offered in evidence?

A. Yes. The motion for leave to file the supplemental bill was filed October 24, 1923.

Q. Now, Mr. Stetson calls to my attention that although Judge Hazel had rendered an opinion sustaining the Master's report and overruling both parties' exceptions, the actual order on that was not entered until after the supplemental bill was filed and an order made allowing the same. That is correct, is it? The leave to file supplemental bill seems to have been granted on October 23, 1923?

83 A. Your statement is correct. Judge Hazel's decree making the award was October 6, 1924.

Q. Now, then, without attempting to have you recite all of the supplemental bill, and without encumbering the record by offering it unless Mr. Hertzog wants it, will you tell us whether the purpose of that bill was to try to impress upon the assets of the new company, the U. S. Light and Heating Corporation, the judgment which you had obtained, that is to say, the Safety Company had obtained in the patent infringement suit that we have been talking about?

A. Yes; and to impress this as a lien prior and superior to the lien held by the Guaranty Trust Company of New York as Trustee under a mortgage which I believe is in evidence.

Mr. HAIGHT. Marked P–14.

Q. Now, Judge Hazel eventually decided that point, didn't he?

A. Yes; in plaintiff's favor.

Q. And about what date was that?

A. The opinion was August 21, 1924; the decree was October 6, 1924.

Q. And that decree is Plaintiff's Exhibit 9?

A. Yes; and the opinion is reported in 2 Federal (2d), 384.

Q. Now, then, I presume that appeals were taken from that decree?

A. Appeal was taken by defendant. The appeals were never completed to the extent of taking it to the upper Court, however, and plaintiff stood ready to appeal if the transmission to the upper Court was going to be completed.

84 Q. Well, now, then, after the appeal was taken by the defendant negotiations for settlement got under way?

A. Yes.

Q. And was it the intention of the plaintiff to appeal from Judge Hazel's decree cutting down the profits which the plaintiff was en-

titled to from seven hundred odd thousand dollars to five hundred odd thousand dollars?

A. Yes.

Mr. HERTZOG. Just a minute; I object to the witness testifying to what the plaintiff intended to do, if the defendant appealed. The plaintiff here is a corporation and——

Mr. HAIGHT. Well, he was in charge of it.

Mr. HERTZOG. Well, he was an attorney in charge of the litigation, but it seems to me the corporation would have to authorize any appeal that might be taken, and I don't think this witness is qualified to state the intention.

Q. Let's settle the whole thing; how do you know that you intended to do that?

A. Those were the instructions that were given to me and my associate counsel by the officers in charge of the Safety Company at that time.

Q. I suppose that was after conference with your attorneys as to the possibilities and probabilities of success of such an appeal?

A. Yes.

Q. Now, Mr. Haynes, when these negotiations for settlement got under way, did they consume some time?

A. Initially, a few weeks; yes.

85 Q. And did they finally result in a settlement?

A. Yes.

Q. What was the settlement?

A. $200,000, payable by the defendant to the plaintiff.

Q. And was that actually paid?

A. Yes.

Q. In the year 1925?

A. Yes. The satisfaction of decree was filed May 9, 1925.

The COURT. What was that exact amount?

Mr. HAIGHT. $200,000.

Q. From the point of view of the plaintiff, will you tell us of your own knowledge why the plaintiff settled that judgment of $501,000 for $200,000?

Mr. HERTZOG. Just a minute. Again I must object.

The COURT. Do you know why?

The WITNESS. Yes; I know why.

The COURT. You may answer.

A. The ruling by Judge Hazel as expressed in the opinion in 2 Federal (2d), 384, holding the new U. S. L. liable for the infringement of its predecessor was to some extent new law. We, by that I mean the plaintiff, were not one hundred per cent confident that the Circuit Court of Appeals would affirm that ruling. Unless that ruling were affirmed, the judgment was substantially worthless because the new U. S. L. was the organization that had any resources. Plaintiff also was naturally interested in stopping the litigation and was willing to make some sacrifices to do that.

86 Q. Was it in any way influenced by the possibility that the award of $501,000 odd would be upset on appeal or reduced, I should say?

A. No; it was our belief and contention that the award was less than we were entitled to under the facts of the accounting.

The COURT. That is as to amount only?

The WITNESS. As to amount; yes. Your Honor, it was our contention that the award should have been for the entire profits instead of for roughly five-sevenths of the profits.

The COURT. As I understand you then, the prompting motive in settling that $501,000 for $200,000 was because you were not so sure that the decision of the Court would be sustained on an appeal.

The WITNESS. The decision as to holding the new U. S. L. responsible for the debt of the old?

The COURT. Yes.

The WITNESS. The other part of the decision awarding us the $501,000, we were confident would be either sustained or increased on appeal.

Q. Then, as I understand it, your thought was, in fact you knew that unless you could sustain Judge Hazel's holding that this $501,000 could be impressed upon the property of the new company and ahead of the mortgage of the Guaranty Trust Company, your chances of getting anything were nil?

A. Substantially nil.

Q. And after weighing all the probabilities, you determined to take $200,000 cash and close the matter up?

87 A. Yes—by "we" I mean the plaintiff.

Q. Yes, I understood that. Now, I will state on the record for a matter of continuity, because it is admitted in the answer, that the expenses in connection with the litigation after the filing of the supplemental bill amounted to $23,468.05; so that the net amount received by the plaintiff was $176,531.95. That is correct, isn't it?

The COURT. The settlement you made was made voluntarily and without any compulsion of any kind, was it?

The WITNESS. There was no compulsion, your Honor; that is, we had made no attempt to levy execution.

The COURT. Just a discretionary matter with you?

The WITNESS. Yes; it was made as a business decision of the executive officers of the plaintiff.

Mr. HAIGHT. Now, in order to save time, we wanted to apportion the $200,000 among the periods, but it is a mere matter of calculation. Suppose I just let that be put in the evidence and then we will have it there rather than have it in some separate sheet. We will give you a copy of this from which these figures have been read in.

I will just state that I offer it, and it is not, of course, binding on you.

Mr. HERTZOG. It is just a matter of calculation.

Mr. HAIGHT. I now offer in evidence the tabulation showing the distribution of the profits allowed to the Safety Company by Judge Hazel, both the total amount, that is to say, $501,180.32, and
88 the portion thereof which accrued prior to March 1, 1913, namely $436,157.41, and the apportionment of the $200,000, period by period, on the same basis. Now, that is offered in evidence for keeping the evidence straight at this point, and instead of being made a physical exhibit, I think it had better be put right in the minutes and it is not to be at all binding on Mr. Hertzog.

Mr. HERTZOG. I object to the exhibit on the same ground as previously.

Mr. HAIGHT. It is not offered as an exhibit.

Mr. HERTZOG. Just to be copied.

Mr. HAIGHT. It is offered merely for the purpose of assisting the Court in examining the evidence.

Mr. HERTZOG. It is understood here that my objection is made to all of the evidence that this witness has testified to, both from the record and everything else.

The following statement shows the amount received by the Safety Company in settlement of its claim. The award was $501,180.32. The amount received in settlement was $200,000 or 39.905% of the award. This percentage is applied against the award of the Master for each period to and including March 1, 1913, viz:

89 Column (a) is the period.
Column (b) profits awarded for period (a).
Column (c) percentage of profits received in settlement (39.905% of the award).

| (a) | (b) | (c) |
|---|---|---|
| 1st period—18 mos.: 1/1/09 to 6/30/10 | $33,101.20 | $13,209.03 |
| 2nd period—12 mos.: 7/1/10 to 6/30/11 | 147,505.53 | 58,862.08 |
| 3rd period—12 mos.: 7/1/11 to 6/30/12 | 171,608.73 | 68,480.46 |
| 4th period—8 mos.: 7/1/12 to 2/28/13 | 83,921.95 | 33,489.05 |
| Total to 3/1/13 | 436,137.41 | 174,040.62 |
| 4th period—4 mos.: 3/1/13 to 6/30/13 | 41,960.35 | 16,744.28 |
| 5th period—10 mos.: 7/1/13 to 4/30/14 | 23,082.56 | 9,215.10 |
| | 501,180.32 | 200,000.00 |

Mr. HAIGHT. Now, I offer in the same way, another sheet showing the distribution of the $176,531.95—to show how much thereof we claim that we are entitled to consider as capital and nontaxable in the year received and the amount which was taxable in the
90 year received, the two amounts being respectively, $153,621.72 and $22,910.23. These are mere calculations, and if I have the witness testify to them, he will simply be making calculations, and I think it will be better to have them copied into the record, the same as before.

The following table shows the following:

Column (a) period.

Column (b) profits awarded for period in column (a).

Column (c) percentage of profits received in settlement for period of column (a), (settlement was 35.2232195% of the award).

Column (d) earnings received for profits prior to March 1, 1913.

Column (e) earnings received for profits subsequent to March 1, 1913.

| 1 (a) | (b) | (c) | (d) | (e) |
|---|---|---|---|---|
| 1st period—18 mos.: 1/1/09 to 6/30/10 | $33, 101. 20 | $11, 659. 33 | $11, 659. 33 | |
| 2d period—12 mos.: 7/1/10 to 6/30/11 | 147, 505. 53 | 51, 956. 22 | 51, 956. 22 | |
| 3d period—12 mos.: 7/1/11 to 6/30/12 | 171, 608. 73 | 60, 446. 14 | 60, 446. 14 | |
| 4th period—8 mos.: 7/1/12 to 2/28/13 | 83, 931. 95 | 29, 560. 03 | 29, 560. 03 | |
| 4th period—4 mos.: 3/1/13 to 6/30/13 | 41, 990. 35 | 14, 779. 80 | | $14, 779. 80 |
| 5th period—10 mos.: 7/1/13 to 4/30/14 | 23, 062. 56 | 8, 130. 43 | | 8, 130. 43 |
| | 501, 180. 32 | 176, 531. 95 | 153, 621. 72 | 22, 910. 23 |

92 Cross-examination by Mr. HERTZOG:

Q. Mr. Haynes, I refer you to your allocation of the damages or profits for the eight months' period beginning July 1, 1912, ending February 28, 1913, and the four months' period March 1, 1913, and ending June 30, 1930. The total amount of profits for that twelve months' period I believe you testified was $125,882.30?

A. Yes.

Q. And you made an allocation of that for the eight months' period and the four months' period on a proportionate basis of eight-twelfths and four-twelfths; is that correct?

A. Yes.

Q. Now, I will ask you whether or not the books showed the number of equipments sold in each of those periods—the eight months' period and the four months' period separately?

A. The original books of account of the defendant did; yes.

Q. The total equipments sold for that twelve months was 1,160?

A. Yes.

Q. Now, how many of those equipments were sold in the first eight months' period and the last four months' period?

A. I cannot say exactly; I do know that the defendant's business was decreasing. It had reached its maximum in the third period; it was less in the fourth period and still much less than that in the fifth period. So that the prorating shows a smaller number of equipments than would be shown if the actual number had been elaborately computed and an attempt made to apportion the

93 profits thereon by referring back to the original books of account.

Q. You don't know how many there were prior to March 1, 1913?

A. Not exact numbers; no.

Q. Is your testimony as to the decline in sales based on the analysis of the records for that particular twelve months, or is merely based on an analysis of the year-by-year sales?

A. It is based on an analysis some years ago, of the individual sales.

Q. What do you mean by individual sales?

A. Each order that was filled, each equipment or lot of equipments that were sold. Sometimes they were sold singly, sometimes in groups of ten or twenty.

Q. When did you make that examination?

A. During the accounting—it was some years ago when that particular question was active. I cannot say without referring to my records just what year it was.

Q. Wouldn't it be more accurate to determine the damages based on the number of equipments sold in each period rather than on a proportionate basis of eight months and four months?

A. It would be impossible to get it with mathematical accuracy, because the overhead accounts were not kept in a way that made the period end March 1, 1913.

Q. What I mean is if you knew the exact number of equipments that were sold in the eight-months period, wouldn't the result be more accurate to take that proportion of the total damages for that period rather than allocate it on eight-twelfths and four-twelfths basis?

A. You would have to know far more than that. You would have to know the selling prices of the individual equipments.
94 Those selling prices changed somewhat. You would have to know the costs of the individual equipments and you couldn't possibly get it except by apportionment, and while the method you speak of might be more accurate, if you could carry it to its necessary conclusion, it was impossible to carry it to that conclusion.

Q. You mean it would have been impossible to make that allocation from the books, or just what do you mean?

A. I mean from the exhibits in the suit, if you should start *de novo* at the defendant's books and spend enough weeks or months on it, I have no doubt that a figure could be arrived at; but it would again be an approximation, because the defendant's indirect items were not recorded in a way that they stopped on March 1, 1913.

Q. I think that's all.

EDWIN W. HAMMER, called and sworn on behalf of the petitioner-plaintiff, testified as follows:

Direct examination by Mr. HAIGHT:

Mr. HAIGHT. This witness, if your Honor please, if you care to follow his testimony, is offered as an expert to value this claim as of March 1, 1913. Now, probably there is no need of my going into the law and discussion of the law on this point. You understand that what we are attempting to hold is that so far as both cases are concerned we had a capital asset as of March 1, 1913. Now, we are going to try to value it in the light of some one who had simply March 1, 1913, before him.

The COURT. He will be testifying as of the 1st of March, 1913?

95 Mr. HAIGHT. Yes. Then you will have before you both what Judge Hazel found——

The COURT. Just as we did in valuing real estate as of 1913 for income-tax purposes to show the difference between the value in 1913 and the value on a subsequent date?

Mr. HERTZOG. Except that in valuing real estate you have something definite and tangible.

Mr. HAIGHT. Yes; we understand that.

Q. Where do you reside, Mr. Hammer?

A. South Orange, New Jersey.

Q. And what is your profession?

A. I am a consulting engineer.

Q. Where are your offices?

A. In New York City.

Q. Will you please tell us what engineering societies or other learned societies you are a member of?

A. I am a Fellow of the American Institute of Electrical Engineers, a Member of the American Society of Mechanical Engineers, Associate Member of the American Electro-Therapeutic Association, Member of the Franklin Institute of Pennsylvania, Member of the New York Electrical Society. I am a Charter Member of the Edison Pioneers, and I am quite sure I have some other general affiliations of the same character.

Q. How long have you been a Consulting Engineer?

A. Since 1911. I have had an independent practice as a Consulting Engineer prior to that time for fifteen years, having been Engineer for the Board of Patent Control of the General Electric Company and Westinghouse Electric and Manufacturing Company, and prior to that for five years having been Engineer for the Patent
96 Department or Legal Department of the Edison Electric Light Company.

Q. Now, I gather from what you have said that your engineering experience has had a great deal to do with patents and patent matters?

A. Yes; from 1891 on. My contact with patent matters and inventions has been very intimate and extensive.

Q. Have you had occasion during these years to value patents and patent litigation; patent infringements?

A. Yes; I have had a great deal to do with evaluating litigations of different kinds and for different purposes. I have had a great deal to do in valuing patents for purchase and sale purposes; give a great deal of attention to the financial values of inventions and patents for inventions.

Q. Have you had anything to do in the advising of clients in patent litigation as to what they should settle the litigation for, either defendant or plaintiff or both?

A. I have frequently given advice as to the proper course to pursue in such situations.

Q. Has your engineering experience and patent experience been chiefly with electrical matters?

A. No; largely with electrical matters; but I think broadly as relating to mechanical matters as well as electrical.

Q. Now, in your experience, then, you have become accustomed to patents and the various matters that affect the validity of patents and the infringement of patents?

A. Yes; those are all matters with which I am very familiar.

Q. I take it that you have been as a consultant and engineer expert in a great many patent litigations?

A. I probably have had to do with over a thousand litigations in one way or another and have been directly associated as patent expert in nearly 250 cases since 1911.

97 Q. Have you made examinations in the Patent Office for the purpose of determining the validity of patents?

A. Yes; many times.

Q. And the scope to be given to them in infringement suits?

A. Yes, sir.

Q. Now, prior to 1913, had the Safety Car Heating and Lighting Company been a client of yours?

A. Yes; they retained me in June 1912 in connection with some of their litigation.

Q. In what litigation, particularly?

A. Particularly the suit that had been brought shortly before, against the United States Light and Heating Company under the Creveling patent.

Q. Did you at that time make a study of the Creveling patent?

A. I did, a very thorough study.

Q. Did you make a study of the prior art?

A. I certainly did, a very thorough, comprehensive study of that art.

Q. Did you make an examination of the competing systems?

A. Yes; I became familiar with them in all details.

Q. After you had studied the Creveling patent, the prior art, and other things that you have mentioned, did you reach a conclusion as to the validity of the Creveling patent?

A. I very definitely came to the conclusion that the validity of the Creveling patent could not be successfully attacked.

Q. And when had you reached that conclusion as respects March 1, 1913, before or after?

A. Some months prior to that time.

98 Q. Did you study at that time the alleged infringing apparatus or equipment which was being manufactured and sold by the United States Light and Heating Company?

A. Yes.

Q. Did you make a careful study of it?

A. I did.

Q. Did you reach any conclusion as to whether or not that was an infringement of the claims or any of the claims of the Creveling patent, 747686?

A. Yes; I came definitely to the conclusion that as an engineer I could see no way in which the United States Company could avoid the charge of infringement of the Creveling patent in suit.

Q. What have you to say, without going into a description of the Creveling patent, about the position which it occupied in the lighting art?

A. It was unique in that art in that it was the fundamental patent which covered the current control of the generator carried on the train, while at the same time protecting the storage battery as well as the generator against overcharge or excess current.

Q. Would you say that the patent was what we speak of in the patent law as a pioneer patent?

A. It was distinctly a pioneer patent.

Q. Now, I neglected to ask you a moment ago when, as respects March 1, 1913, you reached the conclusion that the defendant, through the equipment which it was manufacturing and selling, was infringing this Creveling patent?

A. I recognized at once that it was infringing; its advertisement of its system was substantially in the language of the Creveling patent. If the proper interpretation was given to the different features of the defendant's system, there was no question whatever as to the fact that the claims of the patent in suit read directly upon that system and that conclusion was very definitely confirmed by all of the study that I gave to the subject from June 1912 to the time I testified in that litigation on prima facie. The conclusion was in advance of that period of March 1, 1913, of which you speak.

99

Q. Now, with the knowledge that you had of the Creveling patent, the prior art, the infringement by the defendant, and the position which that patent held in the car lighting art, do you think that you would have been in a position to advise the Safety Car Heating and Lighting Company what to pay for its claim against the United States Light and Heating Company, assuming that that company was a solvent company before March 1, 1930, and assuming you knew about how many equipments that company had been selling and you knew approximately what profit the Safety Company was making per unit, and assuming that it could have supplied all or the greater part of the equipment which the United States Light and Heating Company did supply; and assuming further, that you were told how much the Safety Company could have raised its price per set if they had not been subjected to competition by the Lighting and Heating Company; and assuming further, the general annual profits that the Safety Company would have made per set on repair parts per set; and assuming further, that you are given the number of sets that were manufactured by the Safety Company up until March 1, 1913, and the sets that were manufactured by the U. S. Light and Heating Company?

A. On the assumptions——

100 Mr. HERTZOG. Would you mind reading that question?

Mr. HAIGHT. I just want him to say whether he is in a position to do it.

A. (Continuing.) On the assumptions of the question I would have been amply competent to have given the advice you call for.

Q. Now, then, will you please tell us what value you would fix as of March 1, 1913, for the claim which the Safety Company had against the U. S. Light and Heating Company on account of the latter's infringement of the Creveling patent, 747686, prior to March 1, 1913; assuming that the Safety Company sold 1,734 pieces of equipment; assuming that the U. S. Light and Heating Company sold up to June 30, 1913, 4,655 sets of equipment; assuming that the average profit which the Safety Company did make and could make during that period of time on every equipment that they sold was $120; that if they had not been subjected to competition by the U. S. Light and Heating Company they would have made $25 more per set; and assuming that there was an annual profit for repair parts and replacements of every set of approximately $15 a year; and in giving your ultimate figure, will you please give us in your own way and as you see fit, the reasons leading you to reach that figure and the way in which you have reached it?

Mr. HERTZOG. Now, let us have that question read.

(Question read by the reporter.)

A. My general conclusion——

101 Q. Now, wait a minute. Please assume further, that by March 1st it was not actually known the exact number of sets which had been put out by the United States Light and Heating Company up to that time, but it was roughly approximated that there were 4,000?

A. My general conclusion would have been that I should advise the setting of a figure of, roughly, $600,000 as the value of the claim which the Safety Company had on March 1, 1913, against the U. S. Company. In arriving at that conclusion I have reduced the figures that are obtainable by making the assumptions that are furnished in the question. For example, I find that on the basis of the number of equipments sold by the U. S. Company to June 30, 1913, making due pro rata allowance for the four months in excess of the period of March 1, 1913, there would have been sold or were sold by the U. S. Company 4,268 equipments, which at a profit of $120 per equipment, amounted to $512,160. In addition to that, I am asked to assume that without this competition the Safety Company would have been justified in selling those equipments and could have sold those equipments to the Pullman Company at an added profit of $25 per equipment, which would mean——

Q. Use the round figures of 4,000.

A. Which would mean $100,000 additional, on the basis of a round figure of 4,000 equipments. In addition to that, there is the further consideration that the Safety Company, having sold 1,734 equip-

ments during that period, would, without this competition, have been in a position to secure an added $25 per equipment, which would have meant, in round numbers, $43,000 more. In addition to that, I am asked to assume that the Safety Company was deprived by the sale on the part of the U. S. Company of profits on repair parts to the extent of $15 per equipment per year. Roughly, on
102 the basis of 4,000 equipments in four years, or an average of a thousand equipments per year, some of those equipments running four years, some three years, some two years, some one year, the company was deprived of $15,000 on that account alone. The sum of these various items is $805,160; and taking into account uncertainties, lack of knowledge, general business conditions, I would have said that the company would have been justified in placing a value at $600,000 on that claim.

Q. I suppose you also took into account in reducing the figures which you have given, the cost of litigation?

A. Yes; that is one of the factors that was in my mind.

Q. Now, then, would you have been willing to advise any client of yours who had come to you and said, "What shall I pay the Safety Company for that claim?" to pay $600,000 with the knowledge that you had of the position of the Creveling patent in the art and the defendant's infringement and the prior art, assuming that there were placed before you these facts that were included in my last hypothetical question?

Mr. HERTZOG. Just a minute; I object to that question on the ground that it asks the witness for an opinion on what some one would pay.

THE COURT. No; asks what his advice would be.

Mr. HERTZOG. What his advice would be on something which cannot be sold.

THE COURT. Which is asking him to answer and give practically the same answer that he has given before, approaching the subject from a different angle.

103 A. I would have advised to get the best possible figure, not to exceed $600,000.

Q. Now, Mr. Hammer, you made an affidavit which was filed with the Bureau of Internal Revenue in connection with the claims of the Safety Company in respect to income taxes for the year 1925, did you not?

A. Yes.

Q. And in that affidavit you assumed certain figures and reached the conclusion: "I am clearly of the opinion that any person with a knowledge of the facts I have enumerated might on March 1, 1913, have reasonably expected to recover from the United States Light and Heating Company, by reason of its infringement of Patent No. 747686, at least the sum of $690,000."

On that affidavit you assumed the profit in the language of the affidavit were at least $110 per equipment?

A. Yes.

Q. And your figures were all based on 4,000 equipments sold by the United States Light and Heating Company, and did not take into account the 1,734 that were sold by the Safety Company, and on which they could have made the additional $25 per set as testified to by Mr. Hulse?

A. That is all true.

Q. And those circumstances account for the difference in the ultimate result that you have gotten now and that which was set forth in your affidavit?

A. That is true.

Q. Now, in that affidavit there was a very apt example of why you thought the Safety Company had a claim which was in the nature of a capital asset, prior to March 1, 1913, and because I considered the example so apt, I am going to ask you to put it on the record.

104 A. I think possibly the best way to get it on the record is to read what I said in the affidavit on that particular subject.

Mr. HERTZOG. I object to the witness testifying——

The COURT. It is his own language.

Mr. HERTZOG. Well, not only to his reading it, but as to his making any comparison of this claim with something else that is not material.

Mr. HAIGHT. If Mr. Hertzog objects to it, I will some time or another adopt Mr. Hammer's example and use it as counsel's argument. I withdraw the question.

Q. That is all, Mr. Hammer.

Cross-examination by Mr. HERTZOG:

Q. Mr. Hammer, what experience have you had in respect to placing a value on claims or damages from patent infringement of this character, that is, putting a market value on the probable outcome of the litigation?

A. Of course, the specific thing does not happen very often. My experience, however, covers at least 40 years. I have been in and out of all kinds of litigations for all kinds of clients on all kinds of subjects. I have assisted in making figures on many phases of litigation. I have had a large experience in the purchase and sale of inventions. I am now negotiating with a large company, some very important inventions. I have been brought into such a litigation as that of the Ford Motor Company, for example, when they were held to infringe a process patent, and the question arose as to

105 how much they should pay, and I assisted in saving the Ford Motor Company a great deal of money by reason of my special knowledge of such matters. In connection with the General Electric and Westinghouse Company litigations for many years, there were many questions which arose necessarily as to terms of settlement, as to the purchase price of this or that, so that I think that I have had an unusual opportunity for gaining a rather broad

idea as to the factors which enter into the evaluating of patent situations of many characters.

Q. Can you name any specific instance where you placed a value on a claim of this character, where you valued in money for the purpose of settlement of suit before trial or where the infringement was contested for the purpose of sale, for sale or assignment of such a claim?

A. I am unable at the present time to put my finger definitely on any particular case where I have worked up a set of figures comparable to those which I have presented here to serve as the basis for the purchase of a claim. I am continually, however, being asked for advice as to the best way in which to effect settlements of litigations, this sometimes representing the receipt of money or the payment of money or the securing of advantages here or there to one party or the other. It doesn't often fall to my lot to decide these questions, but it is frequently my privilege and my duty to advise in regard to it.

Q. Well, the answer to this question, then, is no?

A. It is no, with that general understanding and statement.

106 Q. Mr. Hammer, do you know of any case in which a claim similar to the claim here in question was sold, assigned, or transferred to someone else for a consideration?

A. No; I do not. It is, however, quite common for the owners of a patent to give an approximation.

Q. Well, I think you have answered the question. I don't think that is material to the answer. When did you first make a study or examination of this patent with respect to the infringement by the United States Light and Heating?

A. During the latter half of the year 1912.

Q. Isn't your estimate of value based almost entirely on what, in your opinion, the Safety Car Heating and Lighting Company might recover in the event that the Court held that the patent had been infringed?

A. I would rather say that it was based upon the recognition that the patent was valid.

Q. You assumed that in placing that value, assumed that the patent was valid?

A. I came to the conclusion that that was a fact because in the first place you know that a United States patent is valid——

Q. Well, that is very true.

A. Until proved to be invalid, and there never has been a time when the Creveling patent has been anything but valid. We started out with a valid patent, and we ended with a valid patent, and I knew from my observation and study of the art which could be cited against it that there was no possibility of that patent being declared invalid. The situation was not open to any such interpretation on my part.

Q. Please answer the question: "You assumed that in placing that value, assumed that the patent was valid." I don't think your answer was pertinent to the question.

107 A. I not only assumed it was valid, I knew it was valid.

Q. There was no question in your mind as to its validity?

A. None whatever.

Q. Now, you assumed, then, in fixing that value that the patent would be held to have been infringed and that you would have been entitled to damages?

A. Let us understand. I have made now a valuation and I have stated that if those facts had been placed before me in that form on March 1, 1913, I would have arrived at the same conclusion.

Q. Well, what I want to get at, in placing your value you took no consideration of the fact that although you thought the patent had been infringed and were sure of it in your own mind, yet that the Court might hold that it had not been infringed and that the claimant was not entitled to damages?

A. That is not what you asked me before. You were asking me about validity. Now, if you come to the question of infringement, I say again there was absolutely no chance——

Q. Answer the question. I don't think you are answering questions I am asking you.

A. There is absolutely no question in my mind, prior to March 1, 1913, that the defendant infringed claims 1 to 8 of that Creveling patent.

Q. Can't you answer that?

(Question repeated by the reporter: "Now, you assumed, then, in fixing that value that the patent would be held to have been infringed and that you would have been entitled to damages.")

108 Q. (Continuing.) You assumed that?

A. I assumed it in the wealth of my knowledge of the conditions.

Q. And you gave no consideration to the fact that the Court might not agree with you, did you?

A. I didn't see how the Court could disagree with me on that subject. The defendant's system was the Creveling system.

Q. I am not asking you about that. You knew that this suit was contested by the defendant, United States Light and Heating Company, did you?

A. Yes.

Q. Now, they apparently didn't think that they had infringed the patent.

A. They had hopes, but I don't believe that they doubted for a moment but that they would be mulcted ultimately.

Q. Didn't you testify in these other suits that were filed against the United States Light and Heating Company?

A. Yes.

Q. Weren't you also of the opinion that infringements had occurred there?

Mr. HAIGHT. I object. All right, go ahead, answer the question.

A. Those were cases where I had the hopes but not the convictions.

Q. You testified in your opinion that the patents had been infringed in those cases, didn't you?

A. Yes.

109 Mr. HAIGHT. Were you allowed to testify by any judge as to whether in your opinion it infringed or not?

THE WITNESS. In those days, yes; some judges demanded that I should tell them.

Q. Didn't you express your opinion as to the validity of the patents in those cases?

A. I don't remember.

Q. What did you testify to?

A. I testified as to resemblances and differences as between the defendant's device and the device of the patent in suit, also the arrangement of the patents in suit and those of the prior patents which were cited against me.

Q. Well, in your opinion, the prior art in those cases had not anticipated the patent in question.

A. All that I could do was to point out the salient points and let the Court reach its own conclusion.

Q. In determining your value you did not take into consideration whether or not the judgment could be collected, either, did you?

A. One of the assumptions of the question which led to the figures I have given was that the defendant corporation was solvent and able to pay.

Q. You assumed that any judgment that was recovered against the defendant would be paid?

A. Would be collectible.

Q. Did you give any consideration to the fact that it might be years before judgment could ultimately be rendered and recovered?

A. Understand these figures are my figures of today and not my figures of 1913.

Q. You are testifying today though, aren't you?

110 A. I am testifying today, and one of the things that I have said is that $600,000 is less than $800,000, and that is one of the factors that might well come in as guiding such a conclusion.

Q. In your direct testimony you did not give that as one of your reasons for making the reduction, did you?

A. No.

Q. You didn't take it into consideration then, did you?

A. Yes.

Q. Just what weight did you give it?

A. Enough so that in connection with the other factors it represented a 25 per cent reduction.

Q. What consideration did you give to the fact that the judgment might not be collectible and also to the further fact that it might be a number of years before the litigation was finally terminated?

A. My consideration was that the sum was collectible from the defendant, and that the delay in connection with the other circum-

stances, cost of litigation and so on, might fairly in the aggregate amount to a couple of hundred thousand dollars.

Q. Of course, you also took into consideration the fact that even though a claim might have a certain value on a certain date, yet if recovery and collection of that amount is delayed for a considerable length of time you have to take into consideration some discount for risk of insolvency?

A. That is represented in the $200,000 discount that I have allowed.

Q. Would you have advised a client of yours to pay $600,000 on March 1, 1913, for the lawsuit that had been instituted?

111 A. Not if he could get it for less, but it was worth $600,000.

Q. If he couldn't get it for less, would you advise a man to pay out $600,000 and take over the lawsuit?

A. That is my testimony; yes.

Q. Is the answer yes?

A. Yes; under all the assumptions that have been made as to the conditions.

Q. If you had had the means, would you have paid $600,000 for such a claim?

A. I don't know; I cannot visualize that possibility.

Q. Did you take into consideration the fact that the amount of damages that might ultimately be allowed, even though the infringement were sustained, would be less than the figures which you have assumed in arriving at that figure?

A. No. I think that I would have assumed that the figures would have been higher, in excess of the $600,000.

Q. Isn't it a fact that the Master only allowed a recovery of $501,000?

A. Not on the basis of the figures upon which I have made my calculations. He made—now, understand me—he made two findings; one was that the defendant had made profits of some $708,000, I think are the figures, but that only $501,000 of those profits were properly to be attributable to this invention. I did not agree with him and I don't.

Q. That does not change his findings?

A. It does not change his findings at all, but the findings were that their profits were over $100,000 more than the $600,000 I have stated; and you want to understand, too, that what he found was not that

112 the Safety Company had suffered to the extent of $501,000, but that the defendant had gained to that extent. My figures are based on what the defendant suffered.

The COURT. What the plaintiff suffered.

The WITNESS. What the plaintiff suffered and not what the defendant gained. The two things are distinct.

Q. There is considerable difference, isn't there, between the finding of the Special Master and what should have been, in your opinion, recovered and what has been made the basis of your valuation?

A. No; I think that under all the circumstances—and curiously enough, too—there is a marked correspondence; it is a mere circumstance that that is the case, but it is an interesting commentary on the situation. The Master was looking at it from the standpoint purely of profit, and in my calculation today I have been looking at it purely from the standpoint of what the plaintiff was deprived of.

Q. You were looking at it entirely from the plaintiff's standpoint and not from a disinterested view of the damage that had been suffered, weren't you?

A. I was trying to find out what it was which on March 1, 1913, the plaintiff company had which the defendant took away from it.

The COURT. That is the point.

A. (Continuing.) That is what I have tried to show, and that is not what the Master did. The Master was concerned with something else.

Q. You are basing your opinion from the plaintiff's viewpoint as to what you thought the plaintiff ought to recover and not from a disinterested viewpoint as to what actual damages had been sustained; isn't that true?

113

A. No, no. The situation is entirely simple. The plaintiff company was deprived of certain profits; when the defendant sold these four thousand equipments, it was deprived of the profits on repair parts, through the sale of those equipments. It was deprived of certain profits because of the cutting of prices, and the competition. Those are the things which are really not the subject of very much discussion. I have been given certain figures upon which my calculations were based.

The COURT. Well, your theory apparently is then that this plaintiff here had something on March 1, 1913, that was wrongly taken away from it.

The WITNESS. Very definitely so.

The COURT. And you are fixing the value of that; is that it?

The WITNESS. That is it exactly. I don't care what the Master found, it does not affect this.

The COURT. Does it make any difference at all in your view that the thing you are dealing with is an intangible asset as distinguished from a tangible thing?

The WITNESS. It is only intangible when you come to consider the difficulty in putting your finger on the precise quantitative amounts. If you make certain assumptions as were made to me when these questions were asked, saying that the loss was $15 per equipment on repair parts per year, that there was $25 reduction in the amount of profit per equipment and matters of that sort, then it ceases to be intangible; it becomes something very real, very real. It is something I could sell if it belonged to me. It is subject to barter.

114

The COURT. Yes; but I guess you don't understand the sense in which I am using the word "tangible." Perhaps you are using it as an engineer while I am using it in the strict legal sense.

The WITNESS. Of course, I am not a lawyer, your Honor, I am just an engineer.

The COURT. But you have answered my question.

Q. Would it make any difference in your estimation of the value of this claim whether or not such a claim could be sold or assigned?

A. I don't think that question arises because it is something that can be sold, no doubt about that.

Q. Don't you know that such a claim cannot be assigned?

A. I know it can be assigned. Why, it is perfectly proper—I can make a contract with a patentee at any time to buy up his rights to recover on past infringements. There is no doubt about that at all.

Mr. HERTZOG. The Supreme Court has held otherwise.

Mr. HAIGHT. When? Where?

The WITNESS. I know it is done; it is done every day.

Mr. HAIGHT. Of course, it is done every day.

Mr. HERTZOG. Not without the assignment of the patent.

115 The COURT. Well, gentlemen, are you about finished now? Don't let's get into the questions of law now.

Q. Assuming that the claim for past damages for infringement cannot be assigned, would that make any difference in your estimate?

A. I am not willing to make any such assumption.

Q. I am asking you to assume it.

Mr. HAIGHT. I object to the question because it is not relevant or material. There is no such rule and there is no use asking any such question based on assumptions that are not supported by the law.

Mr. HERTZOG. The Supreme Court said otherwise in Crown Company, 261 U. S.

Mr. HAIGHT. Oh, that's an entirely different situation. That suit of Chief Justice Taft, as Mr. Hammer knows, was that you could not separate the patent and say to one man, "I give you a right to sue on that patent", unless you assign the patent to him. It is entirely different from saying that when a man has a chose in action, an unliquidated claim, that he cannot assign it. I don't know of any state today which does not permit the assignment of a chose in action. Of course, it was the common law that it could not be done, but that has been done away with, and we deal with subjects of this kind according to the laws of the state and not anything else.

The COURT. Proceed, gentlemen.

116 Q. Your estimate of the recovery in this litigation on March 1, 1913, if it were successful is $805,000. True?

A. Yes; on the basis of the figures that were submitted to me.

Q. And the value which you have determined, $600,000, gives no consideration to the fact that the Court might determine damages on a different theory than you think it should?

A. Mind you, I am talking about damages; I am not talking about profits, and I have given what might be called an upset value of

$600,000 to an $800,000 claim, which takes into account any possible uncertainties.

Q. Do you know what proportion of such suits for damages for patent infringement are successful? What has been your experience in that regard?

A. Well, I think that the general run of decisions favorable to patents is about 50 percent; maybe a trifle more than that.

Q. That is as to validity?

A. No; I think as to validity the proportion is greater. I was taking in all possible shades and variations in decrees.

Q. Was this patent held valid by any Court prior to this suit?

A. No; and it never has been declared invalid by any Court any time. The patent was valid to begin with, and always has been valid. It did not require a decision of a Court to make it valid.

Q. Well, isn't it possible that the Court in this case might have decided that the patent wasn't valid?

The COURT. Of course, that is a matter of argument.

117 Q. That's all, I believe.

Redirect examination by Mr. HAIGHT:

Q. Mr. Hammer, as of March 1, 1913, you would not have been in a position to value this claim on the basis of what profits the defendant may have made for the use of the Creveling patent, I take it?

A. Absolutely not.

Recross examination by Mr. HERTZOG:

Q. Do you think the defendant was in a position to defend on that ground and have the damages determined, if any, on that basis?

A. No; because damages and profits are two different things.

Q. Isn't that the basis on which the Court finally determined the damages?

A. Yes, and only——

Q. That's all?

A. (Continuing). Only for the reason that the defendant withdrew claims for damages?

Mr. HAIGHT. I offer Poor's Manual, 2635 and 2636 of 1912 in reference to United States Light and Heating Company, and page 1081 of Poor's Manual of 1913 in reference to the same company. I will have photostatic copies made and marked and furnish the other side with them.

118 FRIDAY, *April 8, 1932.*

(Hearing resumed pursuant to adjournment.)

Appearances as before noted.

*Colloquy*

Mr. HERTZOG. Did you close your case?

Mr. HAIGHT. Yes, we closed at the last session.

Mr. HERTZOG. Was that announced?

Mr. HAIGHT. I thought that was understood, that we rested.

The COURT. Proceed.

Mr. HAIGHT. Now, we did offer all of Poor's Manual and we will have these photostatic copies marked.

(Photostatic copies referred to, being pages 2635 and 2636 of the 1912 Edition of Poor's Manual, page 1081 of the 1913 Edition, and pages 2326 and 2327 of the 1914 Edition, received in evidence and marked "Exhibit P–15.")

The COURT. Now, aside from the record, for a moment.

(Discussion off the record.)

The COURT. Since the adjournment a request was made to take additional testimony. That request I now grant, and the testimony will now be taken.

Mr. HERTZOG. Your Honor will recall that objections were made during the proceedings to certain evidence that was offered by the plaintiff in connection with matters which occurred between
119 March 1, 1913, and 1925. The objections were overruled, with the reservation that at the close of the case we would have the right to move to strike that testimony. For the purposes of the record I now move to strike all the testimony offered with reference to matters occurring between March 1, 1913, and 1925, on which I assume the Court will reserve its decision.

The COURT. Well, in a general way what was that testimony? That was practically all the testimony in the case, was it not?

Mr. HERTZOG. No; not entirely. It was merely on the ground that anything that happened after March 1, 1913, and up till 1925, when the settlement of the patent litigation was effected, is wholly immaterial and irrelevant to any of the issues involved in this case. Now, the issues in the case are whether or not the amount received in 1925 was income, taxable income, in that year, and——

The COURT. And if it be shown that it was taxable income in which the party had a vested interest or an inchoate interest, prior to March 1, 1913, that would be an issue also, would it not?

Mr. HERTZOG. That would be an additional issue, but in connection with that issue I submit that it is wholly immaterial, what happened after March 1, 1913; we would have to consider only the conditions that existed on March 1, 1913, and could not take into account what happened subsequent to that time, except the receipt of the money——

120 The COURT. And as to the value of the matter in issue here, as I remember it, the expert testified and fixed the value as of March 1.

Mr. HERTZOG. Yes; that is true.

The COURT. Is that correct?

Mr. HERTZOG. That is correct.

The COURT. Now, your contention is that any testimony that shows what actually was done, to wit, the payment of the tax and the levying of it, and the amount of it, is not material.

Mr. HERTZOG. I don't mean the tax; I mean merely the testimony that goes to show that judgment was entered in 1914 or 1913, in a patent litigation suit, but the report of the Master and so on, as to those proceedings, has nothing to do with the value of the plaintiff's claim, if any, on March 1, 1913.

The COURT. In other words, your contention is that no knowledge should be used in the ascertainment of the value of that claim prior to March 1, 1913, except that knowledge which was available on or before March 1, 1913. Is that correct?

Mr. HERTZOG. That is true.

The COURT. Have you any decisions on that?

Mr. HERTZOG. Well, no, Your Honor, but it seems to me it is perfectly obvious that anything that happened after March 1, 1913, could not affect the value of the claim on that date, that you have to take into consideration only conditions that existed at that time.

The COURT. Well, I will reserve passing on it at this moment, and you may renew the motion when you sum up.

121 Mr. HERTZOG. Very well. Now, I would like to offer in evidence a protest filed by the plaintiff before the Commissioner of Internal Revenue, which is stamped received November 13, 1928, to which is attached an affidavit of Edwin W. Hammer, who testified in this case.

I understand that counsel has no objection, insofar as the identification is concerned. And I would like to reserve the right to substitute a photostatic copy.

(Document above referred to received in evidence and marked "Exhibit G–1.")

Mr. HERTZOG. I would also like to offer in evidence a supplemental affidavit of Edwin W. Hammer before the Treasury Department, which was signed and sworn to by Mr. Hammer under date of January 14, 1924, and which has reference to the valuation of the Creveling patent as of March 1, 1913.

I would also ask leave to substitute a photostatic copy for that exhibit.

Mr. HAIGHT. This seems to be directed, if Your Honor please, to the valuation of 336 patents of the Safety Car Heating & Lighting Company on March 1, 1913. Now, if there is a segregation of the particular patent in question here, possibly that part of the affidavit may be relevant, if Mr. Hammer were placed on the stand and questioned about it, providing any of the statements therein are inconsistent with what he said here. I would like, however, to read that part.

122 Mr. HERTZOG. I might state that this affidavit was filed by the plaintiff corporation in connection with patent matters.

Mr. HAIGHT. Well, I will let the part that is pertinent to this particular patent go in without availing myself of any technical objection as to the fact that Mr. Hammer was not examined about it. If there is anything in there that——

The COURT. Is that the testimony that you want to put in today?

Mr. HERTZOG. I have one witness that I wish to put on. I will restrict this evidence to the portion applicable to the Creveling patent.

The COURT. Very well; proceed.

(Document above referred to received in evidence and marked "Exhibit G–2.")

Mr. HERTZOG. Before calling the only witness I have, I would like to state that, although the Government's position in this case is that the entire amount received in 1925 was taxable income in that year, without deduction, for any value which the plaintiff's claim for patent infringement had on March 1, 1913, and that no loss, no deductible loss, was sustained in that year, regardless of any value such claim might have had on March 1, 1913, I would like to offer the testimony of a patent expert, to testify as to the value of such a claim at that time, with the understanding that we do not to any extent admit that the loss was sustained.

The COURT. Very well.

123 ARTHUR S. BROWNE, called and sworn on behalf of the Government, testified as follows:

Direct examination by Mr. HERTZOG:

Q. Please state your name.

A. Arthur S. Browne.

Q. Your age?

A. 71.

Q. Residence?

A. Washington, D. C.

Q. Mr. Browne, what is your occupation at the present time?

A. Mechanical and patent expert. I am also a member of the bar.

Q. How long have you been so engaged?

A. 50 years.

Q. Will you please state your educational qualifications for following that profession?

A. I was graduated from Dartmouth College in 1881, and in the following year I entered the office of my father, who had been a patent practitioner for many years at that time in the City of Washington, and have continued in that practice ever since.

Q. State generally what has been your experience in your profession. That is, some of the parties by whom you have been employed, and the nature of your employment generally.

A. During the early part of my practice I was largely engaged in patent soliciting before the Patent Office, but since about 1890 my practice has been almost exclusively in patent litigation. I have been engaged in more than 500 suits involving patents. Among the parties I have represented is, first, the United States. I have
124 been engaged in many cases for the United States in the Court of Claims throughout the past more than 30 years. I have

also been in other cases for the United States in the United States Courts, where sometimes the United States was the plaintiff, in cases involving patents. I have represented the United States in many matters involving the valuation of patents in connection with the German and Austrian patent claims. As Your Honor will recall, Congress passed legislation authorizing the reimbursement of the German and Austrian patent owners for patents that had been seized by the Alien Property Custodian. I have also been engaged by the United States in several suits of the same character as this one, involving the valuation of patents as of March 1, 1913. I also was engaged in three suits by the Canadian Government, in which the Canadian Government brought action for vacating six patents. I was also engaged in one suit for the City of Cincinnati, and another for the City of Independence, Missouri. Among private clients I might mention Thomas A. Edison, whom I represented in several suits on his phonograph patents; the Ford Motor Company; the Victor Talking Machine Company; the Walter Scott Printing Press Company, I think originally it was simply Walter Scott, I think it is now the Walter Scott Printing Press Company; the Crucible Steel Company; Manning, Maxwell & Moore; the Gold Car Heating Company; the Electric Storage Battery Company; the Pennsylvania Railroad Company; the Baltimore & Ohio Railroad Company; the New York, New Haven & Hartford Railroad Company; the Central Railroad Company of New Jersey; the Delaware, Lackawanna & Western Company; the General Motors Company; the Firestone Tire & Rubber Company; the Goodyear Tire & Rubber Company; the
125 Perlman Rim Corporation; the United States Shoe Machinery Company; the Ameranda Petroleum Corporation; the R. J. Reynolds Tobacco Company; the American Tobacco Company; the Curtiss Aeroplane & Motor Company; the E. W. Bliss Company; John Wanamaker; the Linotype Company; the Lanston Monotype Company; the Burroughs Adding Machine Company; the Remington Typewriter Company——

Q. Mr. Browne, in how many cases, approximately, have you been retained in patent litigation?

A. I could extend that list very greatly. I have been in over 500 suits. I kept track of them up until I reached 500, and I reached that over a dozen years ago. I have been in many cases since.

Q. What was the nature of your employment in these cases?

A. As an expert.

Q. Have you ever given advice in regard to the settlement of patent litigation and testified in that connection?

A. Yes. I have been in quite a number of accounting cases, and I have advised clients regarding the settlement of litigation. Shall I mention one or two cases?

Q. If you can, mention several cases.

Mr. HAIGHT. Well, why take the time for that?

The WITNESS. All right.

Mr. HAIGHT. He is undoubtedly qualified.

The COURT. Let's get along.

Mr. HAIGHT. As a patent expert.

Mr. HERTZOG. Very well.

Mr. HAIGHT. Whatever weight that may carry, so far as anything else is concerned.

126 Q. You have given your advice in regard to the settlement of numerous patent litigation cases?

A. Yes.

Q. And has that advice been accepted and acted upon?

A. Yes.

Q. By the parties? What has been your experience with reference to patent litigation, with reference to the time such litigation runs, the time it takes to terminate them?

Mr. HAIGHT. I object to that. What difference does this man's opinion make as to the time it takes to settle litigation? Nobody can tell that. That depends upon a million factors.

The COURT. The objection is sustained.

Q. Mr. Browne, if you were given for examination a certain patent and advised of the profits which the owner had been deprived of by an infringer, and the number of articles sold by the infringer thereunder, the fact that suit had been started for damages and for an injunction to restrain the infringer, would you be able from your experience to place a value on the claim or right of action against the infringer?

A. Yes.

Q. Will you please state what considerations and factors you would take into account in arriving at such a value?

A. There would be a good many factors that would have to be taken into consideration.

Q. State generally what they are.

A. Such as the possibility of the patent being declared invalid, the possibility of it being so narrowly interpreted

127 that infringement would not be held, the possibility that even after a judgment had been obtained it might not be collectible on account of the possible bankruptcy of the defendant or his going out of business; the time element would have to be taken into consideration, which might elapse between the time the estimate was made and the time that the actual recovery could be had. Then the probable expense of the litigation would have to be taken into consideration.

Q. Would you——

A. Also, I might say, the plaintiff might not recover the entire profits which he was seeking, because the Court might apportion the profits. The defendant might have improvements of his own, so that he would be entitled himself to a portion of his profits, so that the plaintiff might not recover his entire expected profits. All of those factors would have to be taken into consideration.

Q. Well, what would you consider would be the inducement of anyone desiring to buy such a claim for patent infringement?

Mr. HAIGHT. I object to the question. The witness has not said anything about buying a claim. He was asked whether he could value it, and he says that he could.

The COURT. The objection is sustained. Of course, you ascertain the value by the rule of the willing purchaser and the willing seller.

Q. Mr. Browne, are you familiar with patent No. 747686, known as the Creveling patent, and other patents or other appliances for lighting railroad trains?

A. Yes.

128 Q. Have you read and examined plaintiff's Exhibit P–10 in this case, which consists of plaintiff's brief on hearing, exceptions to the Master's report, and the Master's report which is incorporated therein?

A. Yes.

Q. Have you examined the extract of the United States Light & Heating Company which was taken from Poor's Manual and is in evidence here as plaintiff's Exhibit——

Mr. STETSON. Plaintiff's Exhibit P–15 is Poor's Manual.

Q. (Continuing) Exhibit P–15?

A. Yes.

Q. Have you read the transcript of the record in this case, covering the testimony adduced by the plaintiff in this Court on March 17, 1932?

A. Yes.

Q. Mr. Browne, assuming that suit had been brought by the Safety Car Heating & Lighting Company on patent No. 747686, known as the Creveling patent, prior to March 1, 1913, and that the defendant therein, the United States Light & Heating Corporation, was a solvent corporation, that the defendant had manufactured and sold approximately four thousand equipments involving the use or infringement of the Creveling patent, and that the Safety Car Heating & Lighting Company had made a profit of approximately $110 on those sold by it prior to March 1, 1913, that there were other competitors in the field, namely, the Consolidated Car Heating, Lighting & Equipment Company, which had sold about 500 equipments prior to March 1, 1913, and the Gould Coupler

129 Company, which had sold about 1,000 equipments prior to March 1, 1913, that except for the competition the owner of the patent might have obtained a greater profit on its own sales and might have sold the equipments previously sold by the United States Corporation at a higher profit than was realized on its own sales, that the equipment business of the United States Corporation was principally if not wholly with the Pullman Company, which was the principal user of such equipment, that there was a business of supplying repair parts for those equipments on which a profit of about $15 annually on each equipment might be realized,

and that except for the competition the owner of the patent might have supplied repair parts for the additional equipments sold by the United States Corporation, that the patent owner had had sufficient facilities for supplying the number of equipments which the United States Corporation had supplied prior to March 1, 1913, and that the Safety Car Heating & Lighting Company had sold 1,734 equipments prior to March 1, 1913, are you able to form an opinion as to the value of the claim of the Safety Car Heating & Lighting Company in so far as it related to a recovery for infringement occurring prior to March 1, 1913?

Mr. HAIGHT. Now, I object to the question because it leaves out, as I recollect it, one factor. It may be that Mr. Hertzog left it out unintentionally. As I recollect it, the testimony was that if it hadn't been for the competition, we could have made $25 more——

The COURT. On each machine.

Mr. HAIGHT. On each equipment.

The COURT. I think he covered that but did not mention the $25.

130 Mr. HERTZOG. I did not mention the $25 because that was a matter of opinion of the witness.

The COURT. Well, that is a factor which is necessary; it is a factor which the other witness considered in forming his conclusion.

Mr. HERTZOG. Well, it was the witness' opinion as to what the corporation might have realized, the additional profit that the corporation might have realized. It was not a fact; it was merely the opinion of the witness.

Mr. HAIGHT. Well, it was Mr. Hulse's opinion, wasn't it?

Mr. HERTZOG. Yes.

Mr. HAIGHT. I don't think it was Mr. Hammer's opinion.

Mr. HERTZOG. No; it is true it was Mr. Hulse's opinion, but it was mere opinion; it wasn't——

Mr. HAIGHT. Well, let the question go with the understanding that it does not contain that factor, and that Mr. Browne is going to supply for that factor a figure of his own. There is one other factor that——

Mr. HERTZOG. Well, just a minute.

Mr. HAIGHT. That I simply call attention to.

Mr. HERTZOG. To cover that other, I am perfectly willing to have included in that question the fact that it had been estimated that the Safety Car Heating & Lighting Company might have realized an additional profit of $25 per equipment.

Mr. HAIGHT. All right. Now, there is one other factor: According to Mr. Hammer's valuation, Mr. Hammer's valuation was

131 based on $120 profit per set, but I am willing to have the question remain at $110, because I am not entirely clear that Your Honor wouldn't be justified in finding that there was a profit of anywheres from $110 to 120; because Mr. Hulse's testimony indicated that there was a variation among different manufacturers. But I would like Your Honor to have that understanding in mind.

Mr. HERTZOG. There is other evidence in the record which tends to indicate that the profit was less than $120. I think $110 is probably an even fairer average than 120.

Mr. HAIGHT. All right. I am not objecting to your question, I simply wanted to call that fact to his Honor's attention.

Q. Will you answer that?

A. The answer is "yes."

Q. Please state what that value is, in your opinion, explaining fully the manner in which you arrive at it, as of March 1, 1913.

A. There are several factors included in the hypothesis which seem to me to be too speculative to justify placing any value at all upon. The question asks me to assume that there were four competitors in the field supplying lighting equipments for railway cars. I will refer to them briefly as the Safety Company, the United States Company, the Gould Company, and the Consolidated Company. Where there are several competitors in the field, it, is, I think, impossible to say that any reduction in the plaintiff's prices was exclusively due to the competition of the United States Company. It might equally
132 have been due to the competition of the Gould Company or of the Consolidated Company. Therefore, had the United States Company not been in the field, I think it altogether too speculative to assume that the plaintiff would have gotten any additional price for its equipment. I think this is also particularly true when the business of the United States Company is taken into consideration. Its business was a large business but largely due to the Pullman Company, sales to the Pullman Company. Now, a large concern like the Pullman Company expects to get a bigger discount or a better price than smaller companies. Had the Safety Company done the Pullman business, it would have made a smaller profit if it had given the Pullman Company a better rate, a better price, than it would have given to smaller customers. Therefore, I think that the estimates of what the Safety Company might have done, the extra profits which it might have made, if the United States Company had not been a competitor, are altogether too speculative to be taken into consideration in valuing the United States infringement on March 1, 1913. The same way with reference to the possible profit on additional repairs. That seems to me to be speculative. The Creveling patent does not purport to cover the individual apparatus which make up the Creveling system. The individual matters, elements, such as the generators, storage batteries, the driving mechanism between the axle and the generator, are matters which anyone could have supplied to the railroad companies as long as they were simply making legitimate repairs, and were not reconstructing the apparatus or becoming a contributory infringer. I think such an item as that is altogether too speculative to be given any consideration whatever in making a valuation as of the date of March 1, 1913. Ac-
133 cordingly, in making my own calculation I have taken the figure of 4,000 cars at $110 per car, or a total of $440.000.

I should have said on March 1, 1913, that there was a reasonable prospect in case of the success of a suit that such a sum might be ultimately recoverable; but if that $440,000 had been recovered at some remote date in the future, the present value of the claim on March 1, 1913, would be very much less.

I have had much experience in hotly contested litigation, and in which long accountings have been involved, and I should have said from my experience, on March 1, 1913, that considering the fact that the suit had just been brought, at least ten years would have elapsed before the final adjudication and the actual payment of the money over to the plaintiff.

The COURT. Take a recess until two o'clock.

(Noon recess.)

AFTERNOON SESSION

ARTHUR S. BROWNE resumed the stand.

Continuation of direct examination by Mr. HERTZOG:

Q. All right, Mr. Browne, will you continue, please? Do you wish the reporter to read the last part of your testimony?

A. No; I know where I left off. I have calculated this present value, using as a basis 6 per cent interest compounded annually, and it amounts to $245,694.

134 The COURT. And what was the figure on the other side, four hundred thousand?

The WITNESS. $440,000.

Mr. DONOHUE. This isn't his final figure.

The WITNESS. No; this isn't my final figure.

Q. Explain what that is. How do you get that?

A. $245,694 is an amount which at 6 per cent, compounded semi-annually, would amount at the end of the ten years to $440,000.

By Mr. HAIGHT:

Q. Let me get that. What was that amount?

A. $245,694.

Q. And that was discounted at 6 per cent, compounded annually?

A. Compounded annually.

Q. For ten years?

A. For ten years.

Q. And what did you get as the total?

A. $245,694 to start with, equaling at the end of a period of ten years $440,000 as the estimated amount recoverable.

Q. I don't get that yet.

A. Or, to put it another way, $440,000 payable ten years from now would be worth, its present value, $245,694.

By Mr. HERTZOG:

Q. Discounted at 6 per cent?

A. Discounted at 6 per cent.

135 By Mr. HAIGHT:

Q. Present worth——

A. Yes; compounded annually.
Q. Present worth of $440,000, discounted at——
The COURT. Six percent?
A. Six percent.
The COURT. Compounded annually?
The WITNESS. Compounded annually; yes.

By Mr. HERTZOG:

Q. Go ahead, Mr. Browne.

A. The next factor to be considered is the possibility that the patent may be declared invalid. I will assume, and my own investigation of the matter in 1913 gave me the opinion, that it was a valid patent. Nevertheless, everyone knows that there are a great many hazards which a patent runs in litigation, and it may be ultimately declared invalid. Even after the District Court has decided the patent to be valid, the Court of Appeals may reach a different conclusion; and the Supreme Court may reach a different conclusion from one of two Circuit Courts of Appeals. In fact, if the Supreme Court decides the patent to be valid, it may subsequently decide the same patent to be invalid. That was true in the celebrated Green Driven Well patent, which in two suits has been decided to be both valid and invalid. It was decided by the Supreme Court in 1887 to be valid, and in 1888, in another suit between different parties, the court decided the patent to be invalid, and affirmed that decision on a rehearing.

136 Of course, I could mention a very large number of cases where even after Courts of Appeals have decided the patent to be valid, through the discovery of new evidence the cases have been reopened and different conclusions have been reached, or a different conclusion reached in another suit.

I have also investigated a number of times the facts regarding patent litigation as to the proportion of cases in which the patentee wins and those in which he loses. On the whole, the patentees win in less——

Mr. HAIGHT. I object to this. This hasn't anything to do with the individual patent, and that is what we must deal with. We must deal with the individual patent.

The COURT. Well, in ascertaining the value as of March 1, 1913, it would seem to me to be proper in a general way to take into account the hazards incident to the validity or invalidity of patents granted, and I will allow it and allow you an exception.

Mr. HAIGHT. Your Honor doesn't want to hear me on that? Because it seems to me that it can't be of any materiality. Here, just see what it is, here is a gentleman who picks out——

The COURT. It shows, if I may interrupt you a minute, one of the factors; it is one of the factors used by this witness in arriving at his conclusion. Now, of course, you may attack it upon the ground that it is not a proper factor to be taken into consideration.

Mr. HAIGHT. Well, if it is a factor that he is using for his
137 own valuation, I haven't any objection to it, because it seems to me that that destroys his valuation.

The COURT. Well, then, you may argue on that.

It is a factor that you take into account?

The WITNESS. Exactly.

The COURT. In arriving at your conclusion?

The WITNESS. In arriving at my conclusion. That is what does happen and has happened in patent litigation.

A. (Continuing.) Now, my investigations show, I might say I have done this, investigated this, on several different occasions, shows that the patentee wins in rather less than one-third of the cases. Of course, there are a good many of those cases that the patentee loses for questions other than invalidity or noninfringement. There may be laches involved, or the title may be bad, or the defendant may have a shop right. But ignoring that class of case, those classes of cases, and taking only into consideration the questions that the cases decided, on the validity of a patent or its infringement, the plaintiff wins in about one-third of the cases. In another third, noninfrigement is the ground of defense as the winning ground, and in the other third of the cases the patent is sustained and declared infringed. So the plaintiff wins on the merits of his patent one-third of the time.

And, of course, there are quite a number of split decisions, where some of the claims are declared invalid and others are declared valid and infringed. In fact, in one case that I ran across, part of the claims are declared valid, part declared invalid, part declared valid and infringed. Now my own opinion in 1913 would have been
138 that this patent was a valid patent; but in view of the hazards of litigation, the gantlet which the patentee has to run of patents and publications all over the world, of prior uses, I should have said that the patentee has a 75 percent chance of winning, of ultimately winning, that there was a 25 percent chance of his failing, failure covering both the question of infringement and of validity.

So that that involves taking 25 percent off of the valuation——

The COURT. Of $245,000?

The WITNESS. Of $245,000.

A. (Continuing.) Which leaves a value of $184,270. Now, there is another hazard that the patentee runs. Assuming that he wins his case, that the patent is declared valid—assuming the patentee gets his decree and an injunction and the case goes to the accounting, there are several hazards which the patentee runs there. The Master and the Court may not give the patentee the entire profits of the defendant. It may be the case that the defendant has improvements of his own on his infringing apparatus, so that the profits are apportioned, so that the plaintiff only recovers a portion of the profits instead of all of them. Then the defendant may go bankrupt. The injunction, of course, puts a stop to the defendant's business so far as the in-

fringement is concerned. So that he has no more profits from that business. They cease. And the injunction plus the expenses which he is put to may result in the defendant's bankruptcy. So that even after the Master's report has been confirmed, there may be nothing collectible from the defendant. So that this involves another chance, namely, the apportionment of the profits, and the insolvency
139 and ultimate lack of any recovery whatsoever. This happens in the case of even strong concerns. Judge Haight will recollect the litigation of the Goodyear Tire & Rubber Company. Judge Haight represented the defendant.

Mr. HAIGHT. No; I did not.

The WITNESS. Didn't you represent the Thropp Company in the argument before Judge Bodine?

Mr. HAIGHT. Oh, yes. I represented the Thropp Company.

The WITNESS. Yes. The suit was against Seiberling, who was president of the Goodyear Company, and the Goodyear Company paid the bills; the Goodyear Company went into bankruptcy, I know I had to take stock in the reorganized company in payment of my bill. And it frequently happens that the effect of adverse litigation puts the defendant out of business altogether, so that——

The COURT. And you say all of those factors have to be taken into account.

The WITNESS. All of those factors.

The COURT. As fixing a value——

The WITNESS. Yes.

The COURT. ——as of March 1, 1913.

The WITNESS. As of March 1. Here is a case where you have got an anticipated recovery as the result of long litigation, and that must be taken into consideration. I think at least another 25 percent ought to be allowed for that; and, accordingly, allowing another 25 percent of the $245,000——

140 Q. Of the hundred and eighty-four.

A. No; I mean 25 percent of the $245,000, not of the 184, leaves $122,847.

Mr. HAIGHT. Leaves a hundred and twenty thousand what?

The WITNESS. $122,847.

A. (Continuing.) And finally there must be taken into consideration the expense of the litigation. I do not estimate any of the expense leading to the interlocutory decree up to the time that the patent is sustained and the accounting ordered, because in most cases the injunction is the principal thing sought by the plaintiff. Ordinarily, the injunction is more valuable to the plaintiff than the recovery of profits or damages. So I do not attach, do not estimate, any of the expense of the primary litigation in considering the value of the claim, but only the expense on the accounting and the collecting of the money. In cases where high-class counsel and high-class experts are employed, and a high-class master, competent to pass upon a case of this sort, the expenses are very large. Then that,

of course, whoever puts in the expenses—you have got to allow interest on his payments from time to time up to the date of the final recovery. I estimated the cost, that the prospective cost, of such an accounting procedure and the collection of the money would be $30,000, which I think is a modest estimate. Deducting that $30,000 from $122,847 leaves $92,847.

Now, I think that in addition to that there is a further item to be taken into consideration, and that is to say that anyone, investing money in a profit dependent upon patents, expects more than
141 the legal rate of interest, expects to get more money than if he put the money out on first mortgages. No one, for example, would have bought such a claim in 1913 except as a sporting, gambling proposition; and I think that such a purchaser would expect to get a profit of at least as much as he put forward. That is, assuming that 92,000 odd dollars was to be the estimated ultimate recovery, a person paying cash for it in advance would expect to have with the patentee or the owner of the patent the amount estimated to be recovered. Certainly no bank or trust company would make any such investment at all. So assuming that the purchaser of such a right split evenly with the owner of the patent, the amount he would be willing to pay would be $46,423.50, or to use round numbers, I think that $50,000 is the most which any reasonably prudent person on March 1, 1913, would have given for the possibilities of recovery in this suit.

Q. In your opinion then the value of this claim on March 1, 1913, was approximately $50,000?

A. $50,000.

Q. On the basis of the assumptions which you have given?

A. On the basis of the assumptions and the reasons which I have given.

Q. Now, on the same assumptions outlined in the hypothetical question, but changing the number of equipments sold to the United States Light & Heating Corporation prior to March 1, 1913, to 4,268 equipments instead of 4,000, and changing the profit estimated to be made by the Safety Car Heating & Lighting Company from $110 per equipment to $120 per equipment, are you able to form an opinion as to the value of such claim?

A. Yes.

142 Q. As of March 1, 1913?

A. Yes. On that same basis, I won't go through the calculations again——

Q. No; that won't be necessary. What is the result?

A. Yes. The result is that the calculated amount would be $56,497 or in round numbers $60,000. If that had been the original assumption, then I should have estimated that $60,000 would be the reasonable price, the reasonable valuation, on March 1, 1913.

Mr. HERTZOG. You may cross-examine.

Cross-examination by Mr. HAIGHT:

Q. Mr. Browne, in making your deduction of something like $100,000, to bring what you consider to be the present worth of the claim to be collected ten years hence, did you take into account that the owner of the claim would be entitled to recover interest on the damages from that time, during the ten-year period?

A. He might or might not. It would depend upon——

Q. Well, he would, wouldn't he?

A. What?

Q. He would, wouldn't he?

A. Ordinarily, in my experience——

Q. No; I am asking you, you are a lawyer now, you know as a matter of law, don't you, that when a man has a claim against another person that is capable of ascertainment, he is entitled to interest from the time that claim arose until the time it is paid?

A. No; not in patent litigation. If there is any——

Q. Well, what is the difference between patent litigation and any other litigation, so far as the recovery of interest on a claim for damages is concerned?

143 A. Because my observation is that——

Q. I don't care anything about your observation. I want to know what the law is. You say that you are a lawyer. Now, then, not your observation, tell us what the law is.

A. The law is that interest is calculable from the day on which the Court finally determines the amount due.

Q. You are talking about the allowance of profits there, aren't you, interest on profits?

A. Interest on profits.

Q. Yes. Would you be surprised if I told you that the Circuit Court of Appeals of this Circuit has recently held that interest for infringement can be dated as far back as four years before the bill of complaint was filed?

A. I shouldn't be at all surprised, and you will find many cases which are otherwise.

Q. Well, that is the rule, isn't it?

A. No; I should not say that is the rule. There must be some exceptional circumstances there.

Q. Now, you are talking about profits?

A. Yes.

Q. Now, then, when you come to the allowance of profits, that being based on the equitable rule that the infringer is a trustee ex maleficio——

A. Yes.

Q. The courts of equity determine when they will allow interest or from what period?

A. Yes.

Q. That is what you are basing your thought on?

A. Yes.

Q. Now, then, that isn't what you were basing your value of $440,000 on.

A. Yes. I——

144 Q. Wait a minute. You were basing that on the damages which the plaintiff had sustained, weren't you?

A. On the assumption that his damages would be the same as the profits.

Q. Oh, no; nothing about the same as the profits. You know as a matter of law that a person whose patent has been infringed can have either damages or profits, whichever he wants, don't you?

A. Yes.

Q. Yes. Now, then, you based your figure of $440,000 on the fact that we were deprived—that is to say, the plaintiff was deprived—of $110 profit on 4,000 equipments?

A. Yes.

Q. Therefore it had suffered damage to the extent of $440,000?

A. Yes.

Q. Now, that was damage, wasn't it?

A. Yes.

Q. Now, don't you know that it is a rule of law that a person who is entitled to damages, as distinguished from the infringer's profits, is entitled to 6 per cent interest on those damages from the time that they were incurred?

A. On March 1, 1913, my opinion, based upon the cases that I was then familiar with, would have shown that the interest was not ordinarily allowed, except from the decree.

Q. Let me put it this way. I won't argue with you about the law.

A. Yes.

Q. Because that is supposed to be settled.

A. Of course, in 1913 I would not have known of any recent case.

145 Q. Well, there is no difference in the law in 1913 and what it is at the present time, is there? So far as you know?

A. There may be a great difference in its interpretation.

Q. All right. Now, let's assume that the patentee or the owner of the patent was entitled to recover interest on the damages which this infringer had caused him from the time that the infringements occurred, when the damages were capable of ascertainment; I mean by that, say, a year hence, after the infringement, he was entitled to damages up until the time it was paid; that would materially increase your figure, wouldn't it?

A. Yes; on that assumption.

Q. Certainly it would.

A. Of course.

Q. Now, then, you would take off 25 percent of the value, as I understand it, because of the chance that the litigation might go against the patentee.

A. Yes.

Q. Why do you take that arbitrary figure of 25 percent rather than 10? I am using 10 merely as an example.

A. Based upon the examination of cases to which I have already referred, and based upon my own experience and my own cases, which show that in about 25 percent the lower court gets reversed by the appellate court.

Q. Do you think, Mr. Browne, that for the purpose of deciding the possibility of a lawsuit any average can ever been struck?

A. Of course, in advance, if you are going to calculate what
146 you are going to get, you have to get some average, you have got to determine or form some basis, have some basis for your opinion.

Q. Well, doesn't every case stand on its own bottom?

A. Every case, of course, stands on its bottom.

Q. Yes.

A. But the law of averages applies to patent litigation as well as——

Q. Well, do you think that the law of averages applies to a pioneer patent?

A. Certainly.

Q. You think it does. Does also the question of the circuit in which you happen to be enter into your calculations at all?

A. Oh, yes; that is an element.

Q. Well, isn't that a very strong element?

A. It is an element; yes.

Q. Yes. Don't the patent lawyers go all over the country seeking the most favorable circuit?

A. They try to go to the most favorable circuit; yes.

Q. So then to take an average of a number of circuits wouldn't give you a fair average—for instance, in the Third Circuit—would it?

A. I think in 1913 that the average in the Third Circuit would have been just about the average of the country, not very much difference.

Q. Well, take the Second Circuit; in 1913 the Second Circuit was notoriously liberal towards patents, wasn't it?

A. That was a liberal court, that was liberal.

Q. Yes. And this case was pending in the Second Circuit?

A. Yes.

Q. Yes.

A. But I should say——

147 Q. So your average wouldn't prevail there, would it?

A. I should have said in that case, in 1913, that the Second Circuit was less liberal that the First or the Third or the Sixth.

Q. Well, don't you know that the First has been the most stringent one right straight along?

A. The First today is the most stringent one.

Q. And it has been right along.

A. But twenty years ago it was not.

Q. But in 1913 there was no more liberal court, so far as patents were concerned, than the Circuit Court of Appeals of the Second Circuit.

A. I should say that that was a very good average.

Q. And there weren't any better judges anywhere.

A. No.

Q. Than there were in the Second Circuit at that time.

A. Oh, no; very fine judges in the Second Circuit.

The COURT. Well, our judges are always very fine.

The WITNESS. Always very fine.

Mr. HAIGHT. Well, I beg to infer by that that the Second Circuit, as then composed, as I recollect it, probably had about as good judges as there were in the United States, and the chances of your going into a case and winning or losing, after you saw the merits of your case yourself, were pretty well settled.

Q. Now, let me get another thing. You said that you took off——

A. They had a very strong Court in the Third Circuit, too.

148 Q. They always had that.

A. They always had; yes.

Q. That was a particularly strong Court in 1913; Judge Buffington, Judge Gray, and Judge McPherson.

A. Oh, a wonderful Court; and look at the Sixth Circuit, with Judge Denison.

Q. But there was none more liberal than the Second; that is what I wanted to get clear—nor none better than the Second.

A. Oh, I would say that the Second was a good average.

Q. Yes. Now, then, you said the Master might not give the entire profits. Your idea was there that he might find that the standard of comparison was such that he would have to reduce the profits to which the patentee was entitled?

A. Yes. He might say that, for example——

Q. Well, I understand what you are driving at.

A. Yes.

Q. That they might not be entitled to all of the profits.

A. Might not be entitled to all of the profits.

Q. Just as the Master held in this case; that we were not entitled to all of the profits.

A. Yes; as he did hold in this case.

Q. Yes.

A. And as has been held in many cases.

Q. I understand that; oh, yes; that is a well-settled rule. But now you are dealing with profits, and your base of $440,000 was damages. They are two entirely different things, aren't they?

A. Well, in one sense, yes; but in another sense they are not; no.

Q. Well, in every sense, aren't they?

149 A. Where the damage is the same as the profits, where you are estimating damages on the basis of profits.

Q. But do you estimate damages on the basis of a defendant's profits?

A. I use that as a gauge in determining——

Q. Well, now, so far as the determination of damages is concerned, the Master or the Court has to follow certain fixed and flexible rules, hasn't he?

A. Yes.

Q. And the damage is the damage that the plaintiff has sustained, irrespective of what the infringer may have made?

A. Yes; and a very difficult thing to prove.

Q. And the profit—the infringer may not have been able to make a dollar.

A. May not.

Q. Yet if the patentee could show that he had suffered damage to the extent of $500,000, they would have to give him $500,000, wouldn't they?

A. Yes. Only——

Q. So, then, when you take off 25 percent of your base, which is grounded on damages, because the Master might allow not all the profits made, you have confused the two things in such a way that you are now trying to take off for profits something that is not applicable at all to damages, aren't you?

A. I am being more liberal than if I considered damages because, as you know, damages are much more difficult to prove——

Q. That isn't what I asked you.

The COURT. Let him explain.

Mr. HERTZOG. Let him explain; yes.

Mr. HAIGHT. I want him to answer, if your Honor please.

150 The COURT. But I desire to have him finish his answer.

A. (Continuing.) Damages are much more difficult to prove. In these accounting cases they go for the profits which the defendant has made rather than for the damages, because the profits are fairly easily ascertainable by looking at his books. If the defendant has kept his books in proper shape, the damages, the profits, which he has made can be derived from his books, but when you come to damages you are out in the field of speculation.

Q. Now, Mr. Browne, have you finished?

A. Yes.

Q. Do you consider that an answer to my question?

A. Yes; I do.

Q. You do. I asked you the simple question. You started out with a base of $440,000.

A. Yes.

Q. Representing our damages, and you deducted from that 25 percent of the figure because you say that the Master might not allow all the profits that the infringer has made.

A. Yes.

Q. Now, I ask you whether you haven't confused the thing to such an extent that your deduction is improper?

A. No, no; I have not, for the reason that I state that if I had started on the question of damages I would have arrived at a smaller sum.

Q. Well, you did start on damages, didn't you?

A. Because that was——

Q. Wait a minute. You did start on damages, didn't you?

A. I started on the profits which——

151 Q. Didn't you say that the $440,000 was based on the profit that we had been deprived of on the sale of 4,000 machines at $120 an equipment?

A. Exactly.

Q. And in getting that profit, that profit that we were deprived of, you gave us the damages that we had sustained, didn't you?

A. Yes; I considered that that was a——

Q. Now, then, you did start on a basis of damages, didn't you?

A. (No answer.)

Q. Now, then, what justification have you, when starting on a basis of damages, to deduct something that the Master might not give us in the way of the defendant's profits?

A. Because that is the only data I have to go by. On damages, regarding percentages on damages, I would have given you a much smaller valuation.

Q. So you start with a wrong base, and then you deduct something that hasn't anything to do with that base, to equalize a proper base?

A. Because I reach the conclusion that the damages and profits would be the same.

Q. Well, now, you know, Mr. Brown, don't you, that there was no possible way in 1913 that these people could have told what the profits of the United States Light & Heating Company were?

A. No; but they could have estimated them.

Q. How could they have estimated them?

A. On the basis of their own profits.

Q. On the basis of their own profits?

A. Yes.

152 Q. Do you think that they could readily, with any degree of accuracy, have ascertained what the profits of another concern were?

A. They could not; but they could—you have got to start on some asumption; if you are going to start on the assumption that you are not going to be able to prove any profits at all——

Q. You know as a matter of fact, don't you, that in all probability their profits were much less than our damages, if they could undersell us to get four or five thousand sets of equipment from us in a period of three years' time, that they were selling them for less than we would have made if we had been able to sell them at our figure?

A. That I have already referred to, and that is, as I have been asked to assume, that the business of the defendant, the United States Company, was largly with the Pullman Company, and of course if you can get a contract with the Pullman Company for 4,000 cars the Pullman Company will expect some consideration, some discount, based upon the size of its order.

Q. Well, the reasonable assumption is—just see if you can answer this yes or no—the reasonable assumption is, if they got the equipment, if they got the order, if they were getting the business because they were selling less than we were selling, that they were making less profits than we were making; that is so, isn't it?

A. Yes.

Q. Then the assumption would be if we had proceeded on the basis of profits of the infringer, that they would have gotten less than we would have gotten in the way of damages.

A. If the damages could have been proven.

153 Q. Now, do you think that gives you any justification for using a means of deducting from a proper base something that has nothing to do with that base?

A. Yes.

Q. All right. Now, you said that you disallowed the $25 a set that we think we could have gotten.

A. Yes.

Q. In addition, for the things that we sold and the things that we would have sold had it not been for this infringing competition, because there were two other competitors in the field.

A. Yes.

Q. Is that right?

A. Yes; and because of the size of the order.

Q. Did you know that the competitors were the Consolidated Company and the Gould Company?

A. I was asked to assume that.

Q. Yes. Did you take into consideration that all of this period of time the Consolidated only sold 500 sets?

A. And the——

Q. No, wait a minute; I want to take just one thing at a time?

A. Yes, yes; that was assumed.

Q. You did consider that?

A. Yes.

Q. Well, you don't think their competition was very strong then, do you?

A. Well, considering the fact that the plaintiff only sold 1,734 sets, I should think that was a fair——

Q. You thought that was about one-third?

A. About one-third.

Q. And you knew that they were infringing?

A. I have been told they were infringing; yes.

Q. Well, the papers——.

A. The record.

154 Q. The testimony of Mr. Hulse——

A. Yes.

Q. That you read showed they were infringing?

A. Yes.

Q. And they considered they were infringing and stopped as soon as this suit was over, didn't they?

A. As soon as a decree was obtained.

Q. Yes, as soon as a decree was obtained. Now, then, you found that the Gould Company had only sold a thousand?

A. Yes.

Q. And you knew that the Gould Company, if you credited Mr. Hulse's testimony, were selling at a price higher than our price?

A. That is what the testimony was.

Q. That is what the testimony was?

A. Yes.

Q. Now, then, they couldn't have been competitors with us, could they?

A. It depends upon the merit of their apparatus that they may have. I find nothing in the record as to the merit of the two——

Q. Well, you found they only sold a thousand equipments?

A. Which is——

Q. And that they were selling——

Mr. HERTZOG. Please let the witness finish.

A. (Continuing.) As against 1,734 by the Safety.

Q. All right, argue all you want to; your value as a witness, if I were sitting in Judge Fake's place, would depend upon your
155 ability to answer questions rather than to argue. However, you can do as you please about that.

Mr. HERTZOG. I think counsel is doing more arguing than the witness.

The COURT. Proceed, gentlemen.

A. Go ahead.

Q. There was a thousand sold?

A. Yes.

Q. And at a higher price than ours?

A. Yes.

Q. The infringer in this case, the U. S. Company, got the 4,000 equipments from us because they sold at a lesser price than we were selling, didn't they?

A. They got them from someone, either from you or someone else.

Q. Well, the assumption is that they got them from us because they were selling at a lesser price, isn't it?

A. Yes.

Q. Yes. Now, then, how could you say that you would expect competition to interfere with us, on the part of the Gould Company, when they had only sold a thousand, and were selling at a higher price than we were selling?

A. Because the Gould Company were certainly selling to people, and the merit of their apparatus may have been such as to justify such higher price as may have been charged.

Q. But we didn't get the 4,000, did we?

A. Or the Gould Company.

Q. No; now, what makes you think that if we couldn't get it, at a lower price than the Gould Company, the Gould Company could have gotten it from us?

156 A. Well, I think with a large order, such as the 4,000 Pullman cars, that whether the Pullman Company dealt with Gould or with Safety, they would have gotten a lower price from each of them.

Q. Well, you know we did get it, as soon as we stopped the U. S. Heat & Light, don't you?

A. No; I don't know that.

Q. Well, let me show you?

A. At least, I don't recall it.

Q. Don't you recall?

A. No.

Q. That Mr. Hulse testified that we did get it?

A. Well, I don't remember the testimony.

Q. Well, let me find that.

A. I think I do recall that now, Mr. Haight.

Q. Yes.

A. Let's assume that they did.

Q. Now, why don't you assume that we would have had the spare work on these equipments, if we had been for the period of years from 1909 to 1913, getting the repair work, as Mr. Hulse testified that we had been getting, and that the average was $15 a set per year?

A. I gave my reason, that I thought it was very highly speculative, if they would have got it from anyone else, because, as I understand, the individual items, the individual devices, which go into this thing are not patented, and repair work—anybody could make the repair work—and a concern like the Pullman Company with its equipment can make its own repair work. It has ample shop facilities.

Q. What I want you to consider is this: Mr. Hulse testified that their experience had been over the four years that they got the repair work—I don't say all the repair work, but repair work on

157 every equipment sold, to the extent of $15 an equipment. Now, why do you say that so far as the future is concerned their experience of the past makes the future speculative? If in four years' time their average had been $15 per piece that went out, why wouldn't you expect that to continue?

A. I couldn't expect it to continue because the larger the field is the more inducement there is for others to go into the supply of repair parts.

Q. Don't you know that——

A. The——

Q. Excuse me.

A. I was going to say that many of the large companies in the United States complain because repair parts concerns are organized to do nothing but supply duplicate repair parts.

Q. Now, I asked you about the future, didn't I?

A. Yes.

Q. But we are only concerned in the valuation up to March 1, with the past, aren't we?

A. Yes.

Q. Now, then, why if by March 1, 1913, the experience of the company had been that the average amount that they got for repairs on every piece of equipment out was $15, why wouldn't you give that to them for the four years after they had found that that was a fair average at the end of the four years?

A. Because they were then dealing—they would have been dealing with a different class of people, who——

Q. Oh, I am afraid you misunderstand me. Mr. Hulse said that their experience had been from 1909 to 1913 that the average amount of repair work they got per equipment was $15.

A. Yes.

Q. Now, we are dealing with the past.

158 A. Yes.

Q. Now, why, if their experience actually showed it for that period of time, don't you give it to them for that period of time?

A. Because there is no assumption that they were going to get it.

Q. But they had gotten it?

A. But they might not have got it for other equipment.

Q. Why don't you think they would have gotten it for other equipment that period of time just as well as they got it for that which they had out?

A. Because a concern like the Pullman Company, for example, has its own shops——

The COURT. Execuse me just a moment, gentlemen.

(At this point a short recess was taken.)

Mr. HERTZOG. Before we go ahead, I would like to ask counsel to show wherein the record states that the Safety Car Heating & Lighting Company received $15 for repairs on all the equipments they sold prior to March 1, 1913.

Mr. HAIGHT. Well, I don't know that I care to be interrogated by counsel, but I will do it for you.

Mr. HERTZOG. Well, you said that the Safety Company received it.

Mr. HAIGHT. Page 58: "Q. Were you able, prior to March

159 1, 1913, to figure what the average annual profit on repair and replacements of parts for each system was?

"A. Yes.

"Q. And did you make that calculation?
"A. Yes.
"Q. Prior to March 1, 1913?
"A. Yes.
"Q. And what was the profit, average annual profit, on repair and replacements of the equipments?
"A. Approximately $15."
Does that answer your question?
Mr. HERTZOG. That doesn't say they received $15 on every equipment that they sold.
Mr. HAIGHT. He said the average. That is what I have been saying to Mr. Browne.
The COURT. Yes; proceed, gentlemen.
Mr. HAIGHT. Prior to March 1, 1913.
Q. Now, then, Mr. Browne, you were to answer why, if they had found that on the equipment that they had sold prior to March 1, 1913, the average profit was $15 per equipment, you do not think that they would have gotten that on the additional equipment that they would have sold had the U. S. Light & Heat Company not infringed or taken the business away from them.
A. I have already said that the United States infringement was mainly with the Pullman Company, and that the Pullman Company was a company so well equipped with its own manufacturing resources that they might have done their own repair work.
160 Q. And that you consider highly speculative also, don't you?
A. I consider it highly speculative; yes.
Q. Yes. But you won't give us the break?
A. No.
Q. All right. Do you also consider that this equipment was a highly specialized, special equipment, with the exception of the batteries?
A. And the generator; I understood that the generator was an ordinary generator.
Q. Well, I presume it was; I don't know.
A. And those——
Q. I will take your word for that.
A. And those two things would be the things most apt to require repair work.
Q. But suppose there were other things. It was highly specialized, wasn't it, equipment?
A. Yes.
Q. Now, what makes you think that the people who wanted their equipment repaired wouldn't have gone to the company that made the equipment to have the things replaced?
A. As I recall, there is something in the record which says that originally the Safety Company did not make its own contrivances; they got them from various people who manufactured them.

Q. Well, why wouldn't they have gone back to the Safety Company?

A. And the Pullman Company might just as well have gone to the original manufacturers of this equipment.

Q. Do you think the Pullman Company knew who the original manufacturers of these parts were?

161 A. The information was certainly available, possible to ascertain.

Q. Let me put the question to you concretely. If you were as fortunate as I was, and had a Ford automobile back in—I won't say as fortunate as I was in 1913; if you were as fortunate as I am now, and had a Ford automobile, and you wanted some part of the Ford automobile that was made by the Ford Company, would you go to some other concern and try to get that part replaced when it wore out?

A. Oh, not with a thing like a Ford.

Q. Certainly not. Well, this thing was of the same kind, wasn't it?

A. No; it was not.

Q. Wasn't it a highly specialized piece of equipment?

A. As to some of the parts; and there were people competent to make those parts—in fact, the Safety Company had got them from the——

Q. People are competent to make Ford parts, too, aren't they?

A. They are competent to make——

Q. How many pieces, for instance, that go into the Ford car are made by people other than the Ford Company?

A. I do not know.

Q. Well, you know there are a great many, don't you?

A. Yes.

Q. And that all over the whole United States every person making any kind of a specialty is bidding for the Ford business?

A. Yes.

Q. Yet you don't think that the purchasers of a Ford car go back to the various manufacturers of the parts of the Ford car to get the parts that they want, do you?

162 A. They do in many instances; yes.

Q. Don't you know that they go to the Ford Company?

A. No; not always. Let's take as one instance the spark plug of the Ford Company. There are several concerns that make that.

Q. The what?

A. The spark plug, which is one of the things that are frequently out of order. There are a lot of concerns that make that same identical spark plug. The Firestone Company makes that same identical spark plug. If your Ford spark plug is out of order you are just as apt to stop at a Firestone service station and get the Firestone——

Q. Well, now, Mr. Browne——

A. And get the Firestone plug; and so with many other parts. Take their batteries; take their batteries.

Q. Well, we will leave the batteries out. We know the batteries are purchased from anybody.

A. Of the Ford; of the Ford.

Q. You are not a business man, I take it?

A. No.

Q. But I assume with your years of experience that you have had enough contact with business to know that the ordinary practice of a purchaser of something that has been worn out in one of its parts is to go back to the manufacturer of the whole part to get that thing replaced?

A. That is commonly so; yes.

Mr. HAIGHT. That is all.

The COURT. That is all, Mr. Browne.

Mr. HERTZOG. That is all. That concludes the defendant's case.

163 Mr. HAIGHT. I want to ask Mr. Hammer just two questions.

EDWIN W. HAMMER, recalled, on behalf of the petitioner-plaintiff, testified further as follows:

Direct examination by Mr. HAIGHT:

Q. Mr. Hammer, what have you to say about the speculative character of the profit that the Safety Car Heating & Lighting Company might or would have made for replacement of parts of equipments which they might have sold to the Pullman Company and the others had it not been for the infringement?

A. I have not considered that the speculative element was of any importance in that connection, because the article was new. The apparatus was all special, with the exception perhaps of such things as belts and batteries. All the switching apparatus, the electrical control devices, all of the special features from the generators and their parts right straight up through to the sockets of the lamps, were special; and there was no reason to suppose that there would be any competition up to March 1, 1913, with the Safety Company, for the supply of the special things that were made especially for their special system.

Q. What have you to say about the speculative character of the items that entered into your valuation which were based upon the probability that the plaintiff, had it not been for the infringement, would have realized substantially $25 per equipment more in profits than they did realize during the period prior to March 1, 1913, having in mind that the speculative feature, as I understand Mr.
164 Browne's testimony, is due to the fact that there were two other competitors, namely, Consolidated and Gould Coupler?

A. I think there is no real speculative element involved, if we consider the competition of those two concerns only, because certainly the competition of the Gould Company did not affect one way or the other the price at which the Safety Company was selling its appa-

ratus; and so far as the Consolidated Company competition is concerned, it was negligible. Out of all of the equipments that were sold up to March 1, 1913, the Consolidated Company sold only a trifle over 6 percent, and its competition, on the average, of those four years, was only 125 equipments a year, and that in itself, in view of all the circumstances, had nothing to do with the price, either higher price or lower price, that the Safety Company got for its equipments. Now, the Safety Company had sold some equipments to the Pullman Company, and lost that business because of the competition of the United States Company, and the United States Company got its business because of its lower price. I knew those facts as early as 1912; I knew of the difficulties that the Safety Company was having, and I know that if it had not been for that competition the prices that the Safety Company would have received for those equipments it sold would have been higher, and I think that $25 is a very modest figure to place on those equipments as an added price. If they could get $480 an equipment with competition, there is no reason why they shouldn't have gotten $505 an equipment or more without that competition. So that I don't think speculative characteristics come into that situation at all.

Mr. HAIGHT. That is all.

165 Cross-examination by Mr. Hertzog:

Q. Mr. Hammer, why couldn't the concerns which were manufacturing the parts which went to make up the completed equipment which were sold by the Safety Car Heating & Lighting Company—why couldn't the repair parts be manufactured and sold by those concerns?

A. Do I understand that you are asking why the outside concerns that were making those parts for the Safety Company could not have sold them to outsiders?

Q. Yes.

A. I don't know why they could not, unless they were under contract not to. The fact seems to be, however, that they didn't, and that in spite of the possibility that they might have done this or that or the other thing, the fact is that the Safety Company was selling those things and making a profit of $15 per equipment per year.

Q. They didn't have any plant for the manufacture of repair parts prior to 1912, did they?

A. Only to a limited extent. Their plant in Jersey City at that time was used principally for assemblage purposes and testing purposes.

Q. They didn't have any plant for the manufacture of parts, did they?

A. Practically not. They made some, but they did not go into the manufacture extensively.

Q. They got those parts from the same manufacturers who made the completed equipment for them, or the equipment which was assembled into the completed equipment?

A. As I understand it, some parts were made by some concerns and other parts by others. These parts came to their factory in Jersey City in wholesale and were there assembled to form complete equipments.

166 Q. And you don't know that such manufacturers couldn't have sold the same parts to the Pullman Company?

A. No.

Q. As repairs?

A. No; my only information is that whatever the possibilities might have been the fact was that the Safety Company sold them and sold them at a profit of $15 per equipment per year.

Mr. HERTZOG. That is all.

Mr. HAIGHT. That is all, Mr. Hammer. That closes the case.

(Discussion as to filing briefs and date for final argument. Date fixed for final argument Friday, April 29, 1932, at 10:30 o'clock A. M.)

(End of testimony.)

Filed January 4, 1934, at 9 o'clock A. M.

GEORGE T. CRANMER,
*Clerk.*

167 PETITIONER'S-PLAINTIFF'S EXHIBIT P–1

Voucher No. No. 58080
027931

The Seaboard National Bank, Mercantile Branch, of New York, N. Y.

MARCH 13, 1926.

Pay to the Order of Collector of Internal Revenue,
5th District, Newark, N. J---------- $46,000.00
Exactly Forty-six Thousand Dollars.
Not over Fifty Thousand $50,000.

THE SAFETY CAR HEATING AND LIGHTING COMPANY,
C. W. WALTON, *Treasurer.*
J. A. DIXON, *Vice President.*

168 Voucher No. No. 60958

The Seaboard National Bank, Mercantile Branch, of New York, N. Y.

JUNE 14, 1926.

Pay to the Order of Collector of Internal Revenue,
Newark, N. J---------- $36,852.89
Exactly Thirty-six Thousand and Eight Hundred
Fifty-two Dollars Eighty-nine Cents.

THE SAFETY CAR HEATING AND LIGHTING COMPANY,
C. W. WALTON, *Treasurer.*
HENRY T. STETSON, *Atty.*

169 Voucher No. 9118 No. 63741

SEPTEMBER 9, 1926.

The Seaboard National Bank, Mercantile Branch, of New York, N. Y.

Pay to the Order of Collector of Internal Revenue, Newark, New Jersey ---------- $44,878.65

Exactly Forty-four Thousand Eight Hundred Seventy-eight Dollars Sixty-five Cents.

THE SAFETY CAR HEATING AND LIGHTING COMPANY,
C. W. WALTON, *Treasurer.*
HENRY T. STETSON, *Atty.*

170 Voucher No. 12126 No. 66420

The Seaboard National Bank, Mercantile Branch, of New York, N. Y.

DECEMBER 14, 1926.

Pay to the Order of Collector of Internal Revenue, Newark, New Jersey ---------- $44,878.65

Exactly Forty-four Thousand Eight Hundred Seventy-eight Dollars Sixty-five Cents.

THE SAFETY CAR HEATING AND LIGHTING COMPANY,
WM. STEWART, *Assistant Treasurer.*
W. L. CONWELL, *President.*

171 PETITIONER'S-PLAINTIFF'S EXHIBIT P-2

Received September 12, 1928, Section D, Audit Review Division

Form 1120 File Code 322 Serial Number 406842

Field Audit

Corporation Income Tax Return

For Calendar Year 1925

Safety Car Heating and Lighting Company

And Subsidiaries

308 Main Street Orange, New Jersey

Date of Incorporation—May 5, 1887

Under the Laws of What State or Country—New Jersey

Kind of Business—Manufacture of Car Lighting Appliances, etc.

Is This a Consolidated Return?—Yes

172

## GROSS INCOME

| | | |
|---|---|---|
| 1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances | $5,050,347.96 | |
| 2. Cost of goods sold— | | |
| (c) Cost of manufacturing or otherwise producing goods (From Schedule A)—See Schedule Attached. | | |
| (e) Less Inventory at end of year | 2,616,344.45 | |
| 3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2) | 2,434,003.51 | |
| 5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds | 81,748.76 | |
| 6. Rents | 421,642.74 | |
| 7. Royalties | 1,475.00 | |
| 8. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule B) | 133,062.37 | |
| 9. Dividends on Stock of Domestic Corporations | 81,900.00 | |
| 10. Other Income (including dividends received on stock of foreign corporations). (State nature of income): | | |
| (a) See Schedule attached | 103,317.80 | |
| 11. Total income in Items 3 to 10 | | $3,257,150.18 |

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## DEDUCTIONS

| | | |
|---|---|---|
| 12. Compensation of Officers (From Schedule C) | $128,330.00 | |
| 14. Repairs (From Schedule D) | 150,929.20 | |
| 16. Taxes (From Schedule E) | 60,356.95 | |
| 18. Bad Debts (From Schedule G) | 566.60 | |
| 19. Dividends (From Schedule H) | 81,900.00 | |
| 20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I) | 393,918.64 | |
| 22. Other Deductions Not Reported Above. (Explain below, or on separate sheet): | | |
| (b) See Schedule attached | 967,961.68 | |
| 23. Total Deductions in Items 12 to 22 | | $1,783,963.05 |
| 24. Net Income (Item 11 minus Item 23) | | 1,473,187.13 |

## COMPUTATION OF TAX

| | | |
|---|---|---|
| 25. Net Income (Item 24 above) | | $1,473,187.13 |
| 27. Balance (Item 25 minus Item 26) | | 1,473,187.13 |
| 28. Income Tax (13% of Item 27) | | 191,514.33 |
| 30. Total Tax (Item 28 plus Item 29) | | 191,514.33 |
| 32. Income and Profits Taxes Paid to a Foreign Country or to a Possession of the United States by a domestic corporation | $18,904.14 | 18,904.14 |
| 33. Balance of Tax (Item 30 minus Items 31 and 32) | | 172,610.19 |

174 SCHEDULE B.—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC.

(See Instruction 8)

| 1. Kind of Property | 2. Date Acquired | 3. Amount Received | 4. Depreciation Prev. Allowed | 5. Cost | 6. Value as of March 1, 1913 (Plus Additions Since) | 8. Net Profit (Enter as Item 8) |
|---|---|---|---|---|---|---|
| Safety Car Htg. & Ltg. Co.: | | | | | | |
| Real Estate & bldgs.—Jersey City, N. J. | Prior to 1913 | $533,089.50 | $104,736.93 | $294,246.75 | $444,760.65 | $193,063.73 |
| Miscellaneous Equipment | Various | 2,432.75 | 5,047.08 | 6,101.08 | | 1,378.75 |
| | | 535,522.25 | 109,784.01 | 300,347.83 | 444,760.65 | 194,444.52 |
| Pintsch Compressing Co.: Gas plants discontinued. | Various | Nil | 84,142.18 | 145,524.34 | | 61,382.16 |
| Consolidated Total | | | | | | 133,062.37 |

175 SCHEDULE C.—COMPENSATION OF OFFICERS

(See Instruction 12)

| 1. Name of Officer | 2. Official Title | 3. Time Devoted to Business | 4. Shares of Stock Owned, Common | 6. Amount of Compensation (Enter as Item 12) |
|---|---|---|---|---|
| W. L. Conwell | President | All | 1,351 | $53,000.00 |
| J. A. Dixon | Vice President | All | 365 | 24,750.00 |
| J. H. Rodger | Vice President | All | 101 | 19,650.00 |
| W. L. Garland | Vice President | All | 25 | 15,780.00 |
| C. W. Walton | Secretary & Treasurer | All | 70 | 9,240.00 |
| William Stewart | Asst. Sec. & Treas | All | 39 | 5,910.00 |
| | | | | 128,330.00 |

SCHEDULE D.—COST OF REPAIRS

(See Instruction 14)

| | 2. Amount (Enter as Item 16) |
|---|---|
| 1. Items: Salaries and wages and materials | $150,929.20 |

SCHEDULE G.—BAD DEBTS

(See Instruction 18)

| | 3. Bad Debts |
|---|---|
| 1. Year: 1924 | $566.60 |

SCHEDULE H.—DIVIDENDS DEDUCTIBLE

(See Instructions 19)

| 1. Name of Corporation | Amount of Dividends | |
|---|---|---|
| | 2. Domestic | 3. Foreign |
| Vapor Car Heating & Lighting Co. | $81,900.00 | $6,655.00 |

176 SCHEDULE L.—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

| | |
|---|---|
| 1. Net income from Item 24, page 1 of the return | $1,473,187.13 |
| 2. Nontaxable income: | |
| (d) Dividends deductible under Section 234 (a) 6 of the Revenue Act of 1924 | 81,900.00 |
| (f) Other items of nontaxable income (to be detailed): | |
| (2) Additional Allowable Depreciation | 16,844.07 |
| (3) Difference between cost and March 1, 1913, Value and Depreciation on Real Estate Sold | 129,441.32 |
| 4. Charges against reserves for contingencies, etc. (to be detailed): | |
| (a) Expenses and State & Local Taxes charged to Contingency Reserve | 49,386.40 |
| 5. Total of Lines 1 to 4, inclusive | 1,750,758.92 |
| 6. Total from Line 14 | 1,575,575.72 |
| 7. Net profit for year as shown by books before any adjustments are made therein (Line 5 minus Line 6) | 175,183.20 |
| 8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year | 5,212,824.87 |
| 177 9. Other credits to surplus to be detailed: | |
| (a) Judgment on patent infringement on profits accrued prior to 3/1/13 | 176,581.95 |
| (b) Federal Tax Refunds and interest | 106,059.54 |
| (c) Book Profit on Sale of Real Estate | 322,507.10 |
| 10. Total of Lines 7 to 9, inclusive | 5,993,106.66 |
| 11. Total from Line 17 | 1,572,526.62 |
| 12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11) | 4,420,580.04 |
| 13. Unallowable deductions: | |
| (a) Donations, gratuities, and contributions | 525.00 |
| (i) Additions to reserves for contingencies, etc. (to be detailed): | |
| (1) Reserve for Contingencies and Taxes | 238,000.00 |
| (2) Interest on Tax Refund credited to Surplus | 28,343.62 |
| (3) Book Profit on Real Estate cred. to Surplus | 322,507.10 |
| (j) Other unallowable deductions (to be detailed): | |
| (1) Dividends Paid charged to Income Account | 986,200.00 |
| 14. Total of Line 13 | 1,575,575.72 |
| 16. Other debits to surplus (to be detailed): | |
| (a) Reserve against Pintsch Compressing Co. Investment | 500,000.00 |
| (b) Adjustment of Depreciation Reserve | 1,072,526.62 |
| 17. Total of Lines 15 and 16 | 1,572,526.62 |

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## QUESTIONS

### KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in E1 or E2 may own or control the source of their material or power; con-
179 cerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation) C

(b) Main income-producing business (give specifically the information called for under each key letter), also whether acting as principal, or as agent on commission; state if inactive or in liquidation. MANUFACTURE OF LIGHTING APPLIANCES AND GAS FOR CAR LIGHTING.

AFFILIATIONS WITH OTHER CORPORATIONS

See Instruction 38

4. Does the corporation own 95 per cent or more of the outstanding voting capital stock of another domestic corporation or of other corporations? YES.

5. Is over 95 per cent or more of your outstanding voting capital stock owned by another corporation? NO.

6. Is 95 per cent or over of your outstanding voting capital stock as well as 95 per cent or over of the outstanding voting capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals, partnerships, or corporations in substantially the same proportion? NO.

7. If the answer to questions 4, 5, and 6, or to any of them, is "yes", answer the following:

(a) Did the corporation file Form 819, Affiliated Corporations Questionnaire, for 1917 or subsequent taxable years? YES. If the answer to this question is "yes" a questionnaire is not required, except under the circumstances described in question (b). If the answer to this question is "no", and the answer to questions 4, 5, and 6, or to any of them, is "yes", procure from the Collector of Internal Revenue for your district Forms 851, 852, 853, and 853A, Affiliations Schedules 1, 2, 3, and 4, which shall be filled in and filed as a part of this return. If the answer to this question is "no", question (b) need not be answered.

(b) Did substantially the same conditions, as are set out in the Questionnaire or Schedule filed for 1924 or prior years, obtain during the entire taxable year 1925? YES. If the answer to this question is "no", a statement, setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stockholdings, a complete schedule of such changes should be submitted on Form 853, Affiliations Schedule 3. If there are companies other than those covered by the Questionnaire or Schedule for prior
180 years which, applying the tests contained in questions 4, 5, or 6, may have come into the affiliated group since 1924, Forms 851, 852, 853, and 853A, are required for the entire group for the taxable year.

(c) Did the corporation file a consolidated return for the preceding taxable year? YES.

PREDECESSOR BUSINESS

8. Did the corporation file a return under the same name for the preceding taxable year? YES. If not, was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or the preceding taxable year? ——. If answer is "yes", give name and address of each predecessor business.

BASIS OF RETURN

9. Is this return made on the basis of actual receipts and disbursements? NO. If not, describe fully what other basis or method was used in computing net income. ACCRUAL BASIS.

AFFIDAVIT

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year as stated, pursuant to the Revenue Act of 1924 and the Regulations issued under authority thereof.

W. L. CONWELL,
*President.*

[CORPORATE SEAL]

C. W. WALTON,
*President.*

Sworn to and subscribed before me this 10th day of May, 1926.

[NOTARIAL SEAL] LOUISE KUHNER,
*Notary Public Queens County No. 957.*

Certificate Filed.
N. Y. Co. Clerk's No. 164 Register's No. 8171.
Kings Co. Clerk's No. 152 Register's No. 8133.
(Commission expires March 30, 1928.)

181 PETITIONER'S-PLAINTIFF'S EXHIBIT P–3

No. 747686. Patented December 22, 1903

United States Patent Office

John L. Creveling, of New York, N. Y.

System of electrical regulation

Specification forming part of Letters Patent No. 747686, dated December 22, 1903. Application filed February 12, 1902. Serial No. 93775. (No Model.)

*To all whom it may concern:*

Be it known that I, John L. Creveling, a citizen of the United States, residing in the borough of Manhattan, city, county, and State of New York, have invented certain new and useful Improvements in Systems of Electrical Regulation, of which the following is a specification.

My invention relates to systems of electrical regulation, and has for its primary object to produce means for charging storage batteries from a generator running at variable speeds and to maintain a desired constant voltage upon the work circuit, regulating the voltage directly by the output of the generator.

A further object of my invention is to produce a construc-
182 tion whereby when the batteries shall have reached a certain voltage—that is, when they have become practically charged—the charging rate will be automatically changed, it being well understood that the voltage necessary to charge the cells at the normal rate will remain almost constant until the cells are practically charged, when a considerable rise in voltage is necessary to maintain this normal charging-current. I have shown means which when this rise in voltage takes place operate to lessen the charging rate, thereby avoiding a useless waste of current and evaporation of electrolyte due to violent gasing of the cells.

My invention also, broadly considered, embodies a regulator adapted to maintain a constant current from a generator driven at variable speed and an interdependent regulator for determining the current which the regulator shall hold constant.

In the accompanying drawings I have shown three of several means for carrying out my invention.

In Figure I, I have shown means for carrying out my invention in which the regulation is effected from the field of the regulator-motor. In Fig. II, I have shown a similar arrangement, in which the construction is slightly modified; and in Fig. III, I have shown another arrangement embodying my invention, in which the regulation of the output or charging-current of the generator is effected from the armature-windings of the regulator-motor.

Similar characters of reference indicate similar parts in all the figures.

In the drawings, I indicate a generator driven at variable speeds. This generator in the present instance is driven from the axle of a moving car after the manner of the ordinary storage-battery car systems, 2 and 3 representing the generator-mains, which extend to a suitable storage battery 4, and lamp or translation cir-
183 cuit 5. A suitable line-switch 6 may be interposed in the generator main circuit.

7 is a regulator-motor, one of whose field coils 8 is in the generator main circuit, and its other field-coil 9, which opposes the coil 8, is at predetermined times included in shunt to the battery-circuit through wires 10, 11, rheostat 13, and wire 14. The circuit of the battery field-coil 9 also includes at predetermined times the rheostat 15, as will be explained. Included in the line 2 are suitable wires 16, 17, one of which runs to the switch-arm 20 and the other to the first contact 19 of the rheostat 21. I have shown the generator 1 as being provided with a shunt-field 22, which is connected by a wire

23 to one of the generator-mains and through wire 24, rheostat 25, and wire 26 with the other generator-main. The armature 27 of the regulator-motor is connected across the dynamo-mains by wires 28, 29 through a suitable resistance 30, preferably a variable resistance. A solenoid at 31 or other suitable device is shown as providing means whereby upon the rise of the batteries to a predetermined voltage the charging rate may be changed. In the various forms of my invention, which for the sake of convenience I have illustrated diagrammatically, I have shown a solenoid at 31 as performing this function. This solenoid at 31 is in Fig. I shown as connected in shunt across the dynamo-mains by the wires 32 and as provided with a core 33, operating a pivoted contact-arm 34, which cooperates with the rheostat 15.

In each of the figures I have shown a line *a*, which indicates the position of the switch-arm 20, where the field is receiving full current and the lamps have the proper amount of resistance in circuit therewith and the battery field-coil of the regulator-motor has the
184 proper amount of resistance therein. This position indicates the lowest speed at which the generator gives its normal output, which output remains constant throughout increases of speed.

The armature-shaft 35 of the regulator-motor is shown as provided with a worm 36, which meshes with a gear 37, which drives the arm 20, preferably by means of a frictional connection 38.

The operation of the device is as follows, the parts being supposed to be in the positions shown in the figures: The generator 1 is started up and upon reaching a critical speed, owing to the fact that the generator shunt-coil 22 receives full current the generator will have its normal voltage, the armature 27 of the regulator-motor also receiving current; but the field of the motor is not excited. When the voltage rises to a predetermined degree, the line-switch 6 closes the generator-circuit. When the generator-circuit has thus been completed, the field-coil 8 of the regulator-motor will receive any current delivered by the generator to the battery or consumption circuit. This current will tend to excite the field of the regulator-motor and cause the motor-armature to rotate, so as to move the switch-arm 20 to the left, which by its movement immediately cuts the regulator-motor field-coil 9 into circuit through the resistance 13 and introduces resistance into the lamp-circuit to compensate for the rise in voltage. As the output rises resistance will be cut out of the battery field-coil circuit 9 and more resistance will be cut into the lamp-circuit until the normal line $\alpha$ is reached, when the lamps will have all of their resistance in circuit and the battery field-coil 9 of the regulator-motor will be receiving its full current. Upon any further

rise in the output of the generator due to a further change in
185 the speed the switch-arm 20 will begin to cut the resistance 25 into the field-circuit of the generator and to thereby cut down the field and maintain a practically constant output. This it does by the action of the coil 8 opposing the action of the coil 9 and overpowering it, thereby causing the switch-arm 20 to move farther to the left, so as to cut down the generator shunt-field upon an increase of output. So far the solenoid 31 has not come into action and the cells were being charged at their normal rate; but let it be supposed that this charging be continued until the cells have become nearly charged, so that a considerable rise in voltage will be necessary to maintain this normal rate. When this occurs the solenoid will operate to change the rate to lessen it, thereby avoiding useless waste of current and evaporation of electrolyte due to violent gasing of the cells. This is accomplished upon a rise in voltage by the solenoid 31 raising its core 33, so as to cut a portion or all of the resistance 15 into the circuit of the field-coil 9 of the regulator-motor. This will weaken the field-coil 9, and the coil 8 will cause the armature 7 of the regulator-motor to revolve in such direction as to decrease the output of the generator until the effect of the current flowing from the generator through the coil 8 will practically balance the reduced effect of coil 9.

In Fig. II, I have shown a similar arrangement, in which similar letters of reference indicate corresponding parts. In this figure the solenoid 31 is shown as having an opposing winding in circuit through wires 40, 41 in the lamp-circuit and operates to vary the resistance 15, which by the wire 42, resistance 43, rheostat 44, and wire 45 is in shunt with the coil 8 of the regulator-motor after the arm 20 has come in contact with the end contact 44a of the rheostat 44. In this form of my invention the charging rate is deter-
186 mined by the solenoid 31 and is varied by varying the effect of the coil 8 by placing more or less resistance in shunt therewith. The function of the opposing winding 40 and 41 upon the solenoid is practically as follows: When the lamp-circuit is open, as indicated in the figure, no current will flow through the wires 40 and 41 and the operation of the solenoid 31 will be as outlined with regard to Fig. I. Should the batteries have been fully charged and the solenoid 31 have caused the charging rate to have been lessened, the closing of the lamp-switch will cause the lamp-current to flow through the differential winding 40, 41 of the solenoid 31, causing the generator to deliver its full normal output so long as the lamp-circuit remains closed.

In Fig. III, I have shown another construction. In this figure the solenoid 31 is in shunt to the generator-circuit by wires 45 in series

with the resistance of the lamp circuit. The regulator-motor is provided with a field-coil 46, which is normally in shunt to the battery-circuit, and is provided with an armature having double windings which oppose each other. One of these windings is connected through the brushes 47 in series with the generator-mains. The other winding of the armature is connected in circuit as follows: from the main 2 by wire 48 through brushes 49, by wire 50, through the arm 34, by wire 11, rheostat 13. The engaging section of the arm 20 is connected to the main 3, as by the wire 14. The object of connecting the solenoid 31 in series with the resistance in the lamp-circuit is if the lamp-switch be open the resistance inserted in the lamp-circuit will not appreciably decrease the current through the solenoid 31, inasmuch as the lamp resistance is negligible as compared with that of the solenoid-winding, and so long as the switch in the lamp-circuit remains open the solenoid 31 will operate practically as if its
187 windings were in shunt across the generator-mains. Now if the batteries are charged until the rise in voltage shall have caused the solenoid 31 to lower the charging rate and then the lamp-switch be closed the difference in potential of the lamp-mains will be considerably less than the generator-mains, owing to the lamp resistance, and consequently the strength of the solenoid 31 will be decreased, thus allowing the generator to deliver its full normal output. The operation of this form of my invention will be readily understood from the foregoing, the charging rate being regulated at the proper time by the solenoid 31, which operates to introduce the resistance 15 into the circuit of the regulator-motor armature-winding in circuit with the brushes 49.

Having described my invention, what I claim, and desire to secure by Letters Patent, is:

1. In a system of electrical distribution the combination with a generator adapted to be driven at variable speeds and a storage battery charged thereby of a regulator adapted to maintain given charging currents throughout changes in speed of the generator and means operated by changes in the difference of potential of the battery determining the said charging currents.

2. In a system of electrical distribution the combination of a generator and accumulator and automatic means, including a device operated by difference of potential determining the charging rate with means maintaining the said charging rate throughout changes in speed of the generator until a change of voltage of the battery causes a change in the charging rate.

3. In a system of electrical distribution, the combination of a generator, automatic means for maintaining the output of the gen-
189 erator practically constant throughout changes in speed and electromagnetic means determining the said output to be maintained.

4. In a system of electrical distribution, the combination of a generator, an accumulator, automatic means for maintaining the current output of the generator practically constant and automatic means determining the said current to be maintained.

5. In a system of electrical distribution the combination of a generator, an accumulator charged thereby, means for maintaining the current output of the generator practically constant throughout changes in speed and automatic means controlled by voltage of the accumulator for altering the current upon changes in voltage of said accumulator.

6. In a system of electrical distribution, the combination of a generator, an accumulator, means for maintaining a desired current output of the generator and automatic means, dependent upon the voltage of the accumulator, determining the said output.

7. In a system of electrical distribution, the combination of a generator, an accumulator charged thereby, a regulating device in circuit with the generator for controlling the current output of the generator, and automatic means governed by the voltage for determining the said current output.

8. In a system of electrical distribution, the combination of a generator, an accumulator, a regulating device for regulating the output of the generator, and supplemental means controlling the regulating device, to determine the said output.

9. A system of distribution comprising a generator, an external circuit, and a regulator-motor having a plurality of windings
190 and a rotating member, the said rotating member tending to rotate to cause a magnetic balance to be set up or preserved between two of the windings and means for varying the current in one of the last-named windings upon a rise in voltage.

10. A system of distribution comprising a generator, an external circuit and a regulator-motor having a plurality of windings, and a rotating member, the said rotating member tending to cause a magnetic balance to be set up or preserved between two of the windings, and means for varying the effect of one of said last-named windings upon a rise in voltage.

11. An electric regulator, comprising a plurality of windings, two of which are traversed by substantially constant currents, and one of which is traversed by the current to be regulated, and means for automatically determining one of the said constant currents.

JOHN L. CREVELING.

Witnesses:

GEO. E. MORSE,

F. E. KESSINGER.

No. 747,686 PATENTED DEC. 22, 1903.

J. L. CREVELING.

SYSTEM OF ELECTRICAL REGULATION.

APPLICATION FILED FEB. 13, 1903.

NO MODEL. 3 SHEETS—SHEET 2.

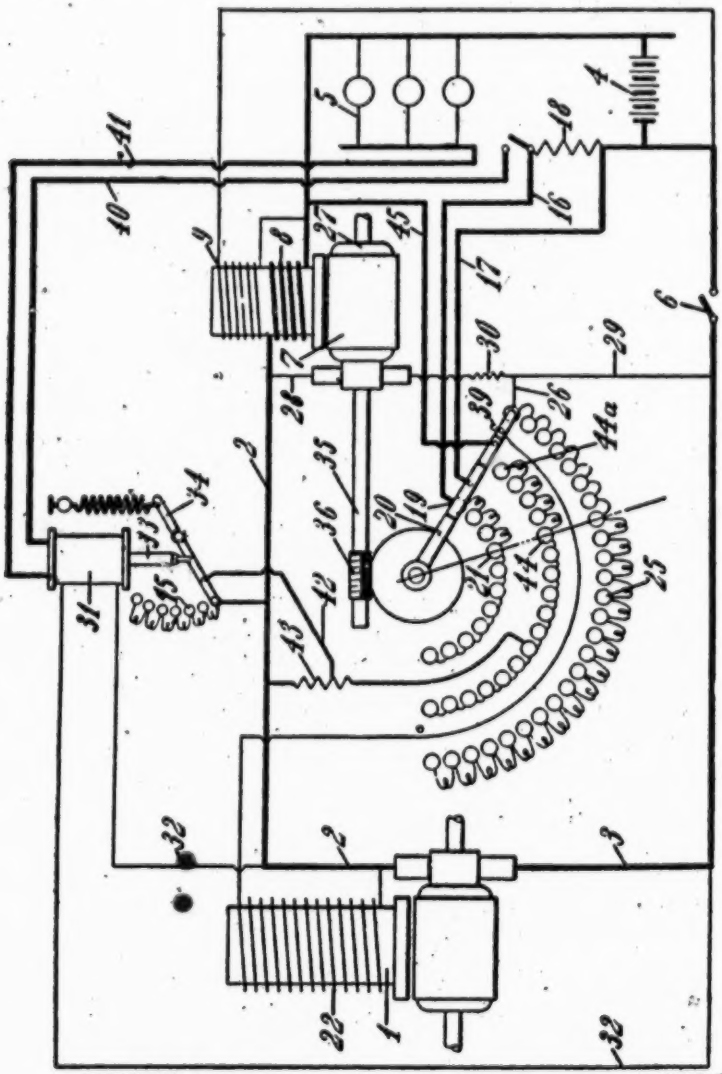

Fig. II.

WITNESSES:

E. J. Schandel, Jr.

A. [illegible]

INVENTOR

John L. Creveling

BY

Stevenson Coe Tuley & Rubin

No. 747,686. PATENTED DEC. 22, 1903.

J. L. CREVELING.

SYSTEM OF ELECTRICAL REGULATION.

APPLICATION FILED FEB. 12, 1902.

NO MODEL. 3 SHEETS—SHEET 3

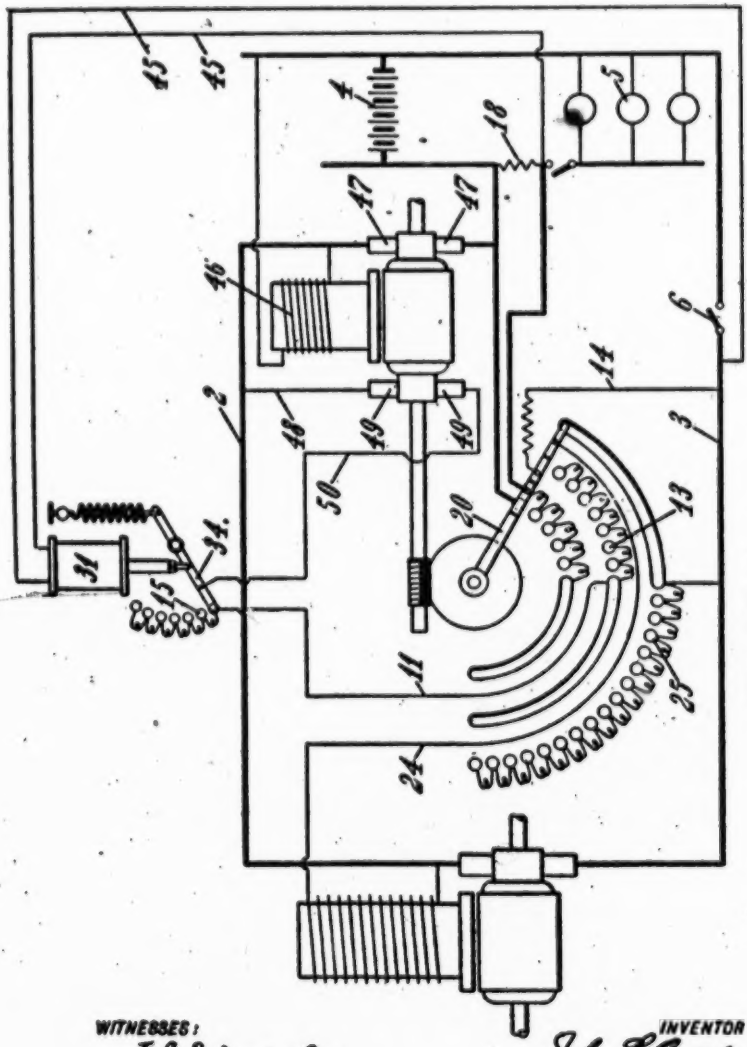


Fig. III.

WITNESSES:
T. J. Schneider, Jr.
Arnold Straub

INVENTOR
John L. Creveling
BY
Thurman Arnold Fairchild & Arnold
ATTORNEYS.

No. 747,686. PATENTED DEC. 22, 1903.

J. L. CREVELING.

SYSTEM OF ELECTRICAL REGULATION.

APPLICATION FILED FEB. 18, 1902.

NO MODEL. 3 SHEETS—SHEET 1.

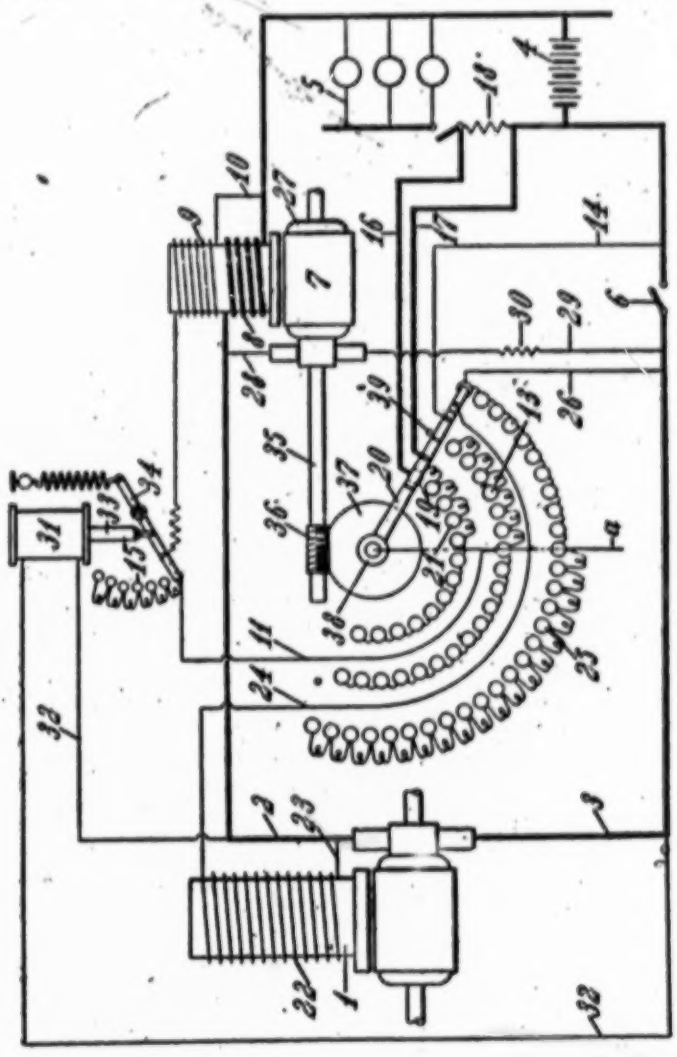

Fig. I.

WITNESSES:

E. J. Schroeder, Jr.

INVENTOR

John L. Creveling

BY

ATTORNEYS.

193 PETITIONER'S-PLAINTIFF'S EXHIBIT P-4

Whereas I, John L. Creveling, am now the owner of or have an interest in certain Letters Patent more particularly described hereafter,

And Whereas the Safety Car Heating & Lighting Company, now owning or having an interest in the same Letters Patent, are desirous of acquiring the entire interest in the same,

*Now, Therefore, to All Whom It May Concern:*

Be It Known that for and in consideration of one dollar and other good and valuable consideration to me in hand paid, the receipt of which is hereby acknowledged, I, the said John L. Creveling, have sold, assigned, and transfered and by these presents do sell, assign, and transfer unto the said Safety Car Heating & Lighting Company all my entire right, title, and interest of every kind and description in and to the following patents, namely:

Letters Patent No. 707763, Serial No. 82,715.
Letters Patent No. 747686, Serial No. 93,775.
Letters Patent No. 835487, Serial No. 185,893.
Letters Patent No. 720675, Serial No. 93,774.
Letters Patent No. 720674, Serial No. 93,773.
Letters Patent No. 719753, Serial No. 39,051.
Letters Patent No. 707052, Serial No. 68,650.
Letters Patent No. 706165, Serial No. 39,048.
Letters Patent No. 704863, Serial No. 28,525.
Letters Patent No. 704864, Serial No. 39,052.
Letters Patent No. 704865, Serial No. 39,050.
Letters Patent No. 704696, Serial No. 64,200.
Letters Patent No. 704694, Serial No. 75,015.
Letters Patent No. 754429, Serial No. 59,602.
Letters Patent No. 721025, Serial No. 133,302.
Letters Patent No. 691359, Serial No. 59,602.
Letters Patent No. 691358, Serial No. 28,524.
Letters Patent No. 11961, Serial No. 76,320 (Reissue).
Letters Patent No. 709848, Serial No. 82,717.
Letters Patent No. 709847, Serial No. 75,014,

194 the same to be held and enjoyed by the Safety Car Heating & Lighting Company for its own use and behoof, and for the use and behoof of its legal representatives, to the full end of the term for which said Letters Patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment, transfer, and sale not been made.

It is the intention of this assignment to give the Safety Car Heating & Lighting Company the absolute title and interest in the Letters Patent aforesaid.

And I, the said John L. Creveling, hereby covenant and agree that I have not done or suffered anything to be done in connection with

my interest or rights in said Letters Patent whereby the Safety Car Heating & Lighting Company should not acquire the entire interest by this assignment; and I further covenant and agree that I will execute all further or other papers, if requested by the Safety Car Heating & Lighting Company or its legal representatives, for the purpose of further assuring to them the absolute title in and to the said Letters Patent, in order that the Safety Car Heating & Lighting Company may not only own the same but may have all rights to prosecute infringers and demand accounts and damages for such infringements.

In Witness Whereof, I have hereunto set my hand and seal this first day of August, nineteen hundred and seven.

JOHN L. CREVELING.

In the presence of—
G. R. JEWETT.
E. E. ALLBEE.

195 STATE OF NEW YORK,
*County of New York*, ss.:

On this 1st day of August 1907 before me personally appeared John L. Creveling to me known and known to me to be the individual described in and who executed the foregoing assignment and he duly acknowledged to me that he executed the same.

G. R. JEWETT,
*Notary Public, New York County.*

GUERNSEY R. JEWETT,
*Notary Public, New York County.*

Recorded August 6, 1907.

196 PETITIONER'S-PLAINTIFF'S EXHIBIT P-5

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
*Washington, December 18, 1929.*

IT:AR:D
HL-60D

SAFETY CAR HEATING AND LIGHTING COMPANY,
*21 South Day Street,*
*Orange, New Jersey.*

SIRS: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1925 and 1926 discloses a deficiency of $22,176.90, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-1. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assess-
197 ment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
*Commissioner.*
(Signed) By DAVID BURNET,
*Deputy Commissioner.*

Inclosures: Statement, Form 866-C. R., Form 882, Schedules 1 to 16, inclusive.
IT:AR:D.
HL—60D.

Statement of Returns Examined and Resulting Tax Liability

Returns Examined

| Company | Year | Form |
|---|---|---|
| Safety Car Heating and Lighting Co., Orange, N. J. | 1925 | 1120 Consolidated |
| | 1926 | 1120 Consolidated |

Tax Liability

Safety Car Heating and Lighting Company, Orange, New Jersey

| Year | Total tax | Previously assessed | Deficiency |
|---|---|---|---|
| 1925 | $126,496.30 | $104,334.23 | $22,162.07 |
| 1926 | 95,750.40 | 95,735.57 | 14.83 |
| Total | 222,246.70 | 200,069.80 | 22,176.90 |

198 The Pintsch Compressing Company, Orange, New Jersey

| Year | Total tax | Previously assessed | Deficiency |
|---|---|---|---|
| 1925 | $67,681.01 | $66,889.90 | $791.11 |
| 1926 | 61,341.33 | 61,331.83 | 9.50 |
| Total | 129,022.34 | 128,221.73 | 800.61 |

## Safety Export Company, Orange, New Jersey

| Year | Total tax | Previously assessed | Deficiency |
|---|---|---|---|
| 1925 | $1,404.28 | $1,386.06 | $18.22 |
| 1926 | 480.59 | 480.52 | .07 |
| Total | 1,884.87 | 1,866.58 | 18.29 |

## Safety Car Heating and Lighting Company

### Statement—Consolidation

| Year | Total tax | Previously assessed | Deficiency |
|---|---|---|---|
| 1925 | $195,581.59 | $172,610.19 | $22,971.40 |
| 1926 | 157,572.32 | 157,547.92 | 24.40 |
| Total | 353,153.91 | 330,158.11 | 22,995.80 |

A Revenue Agent's report has been made the basis of the
199 adjustments producing the above-stated results, as shown in the accompanying Schedules 1 to 16, inclusive.

The statements made in your claim for the refund of $69,729.18, corporation income tax for 1925, have been given careful consideration.

Consents which will expire December 31, 1929, except as extended by the provisions of Section 277 (b) of the Revenue Act of 1926, are on file for the year 1925.

This letter supersedes Bureau letters dated September 28, 1929, and October 24, 1929.

## Safety Car Heating and Lighting Company

### Year Ended December 31, 1925

### Schedule 1

### Consolidated Net Income

| | |
|---|---|
| Net income as disclosed by return | $890,462.33 |
| As corrected | 1,066,994.28 |
| Net adjustment | 176,531.95 |

Unallowable deductions and additional income:

| | |
|---|---|
| (a) Settlement of patent infringement | $176,531.95 |

Schedule 2

Explanation of items changed

(a) The Bureau holds that the amount received in setlement of a suit for patent infringement constitutes taxable income when received in 1925, since an unconditional claim did not exist until a compromise settlement was received in that year.

200 It holds that a claim for damages for patent infringement consists of two parts: first, the infringement or tort; and, second, the damages. It frequently happens that a patentee alleges an infringement which the Court does not uphold. The fact that the taxpayer on March 1, 1913, believed under advise of counsel that its patents had been infringed and that the evidence ascertainable clearly established the infringement does not have the effect of an adjudication that a tort has been committed. The fact that there was a high degree of certainty as to recovery by the taxpayer does not alter the principle that there can be no recovery of damages from the infringement until a Court of competent jurisdiction decrees that an infringement (tort) has occurred. Until such an adjudication takes place the taxpayer cannot be said to have an unconditional claim.

Schedule 3

Consolidated Net Income

Net income as corrected:

| | |
|---|---|
| Safety Car Heating and Lighting Company (Schedule 1) | $1,066,994.28 |
| The Pintsch Compressing Company (shown by return) | 570,887.13 |
| Safety Export Company (shown by return) | 11,837.67 |
| Consolidated net income | $1,649,719.08 |

201 Safety Car Heating and Lighting Company

Year Ended December 31, 1925

Schedule 4

Computation of Tax

Income Tax

| | |
|---|---|
| Net income for taxable year | $1,649,719.08 |
| Income tax at 13 per cent | 214,463.48 |
| Less: Taxes paid to a foreign country ($18,904.14 & $.998823) | 18,881.89 |
| Total tax assessable | 195,581.59 |

## Schedule 5

## Allocation of Total Tax

| Company | Income as reported | Pct. | Tax |
|---|---|---|---|
| Safety Car Heating and Lighting Company | $1,066,994.28 | 64.677 | $126,496.30 |
| The Pintsch Compressing Co | 570,887.13 | 34.605 | 67,681.01 |
| Safety Export Company | 11,837.67 | 0.718 | 1,404.28 |
| Total | 1,649,719.08 | 100.000 | 195,581.59 |

202

## Schedu'e 6

## Allocation of Original Tax

| Company | Income as reported | Pct. | Tax |
|---|---|---|---|
| Safety Car Heating and Lighting Company | $800,462.33 | 60.445 | $104,334.23 |
| The Pintsch Compressing Co | 570,887.13 | 38.752 | 66,889.90 |
| Safety Export Company | 11,837.67 | 0.803 | 1,386.06 |
| Total | 1,473,187.13 | 100.000 | 172,610.19 |

## Schedule 7

## Computation of Deficiency

| | |
|---|---|
| Total tax | $126,496.30 |
| Previously assessed | 104,334.23 |
| Deficiency | 22,162.07 |

## Safety Car Heating and Lighting Company

## The Pintsch Compressing Company

## Year Ended December 31, 1925

## Schedule 8

## Computation of Deficiency

| | |
|---|---|
| Total tax | $67,681.01 |
| Previously assessed | 66,889.90 |
| Deficiency | 791.11 |

203

## Schedule 9

## Safety Export Company

## Computation of Deficiency

| | |
|---|---|
| Total tax | $1,404.28 |
| Previously assessed | 1,386.06 |
| Deficiency | 18.22 |

## Schedule 10

## Safety Car Heating and Lighting Company

## Year Ended December 31, 1926

## Consolidated Net Income

| | |
|---|---|
| Net incomes shown by return and accepted as correct: | |
| Safety Car Heating and Lighting Company | $799,108.85 |
| The Pintsch Compressing Company | 511,942.70 |
| Safety Export Company | 4,008.01 |
| Consolidated net income | 1,315,059.56 |

204

## Schedule 11

## Computation of Tax

## Income Tax

| | |
|---|---|
| Net income for taxable year | $1,315,059.56 |
| Income tax at 13½ per cent | 177,533.04 |
| Less: Taxes paid to a foreign country ($19,985.12 & $.998779) | 19,960.72 |
| Total tax assessable | 157,572.32 |
| Tax previously assessed | 157,547.92 |
| Additional tax to be assessed | 24.40 |

## Safety Car Heating and Lighting Company

## Year Ended December 31, 1926

## Schedule 12

## Allocation of Total Tax

| Company | Income as reported | Pct. | Tax |
|---|---|---|---|
| Safety Car Heating and Lighting Company | $799,108.85 | 60.766 | $95,750.40 |
| The Pintsch Compressing Co | 511,942.70 | 38.929 | 61,341.33 |
| Safety Export Company | 4,008.01 | 0.305 | 480.59 |
| Total | 1,315,059.56 | 100.000 | 157,572.32 |

205

## Schedule 13—Allocation of Original Tax

| Company | Income as reported | Pct. | Tax |
|---|---|---|---|
| Safety Car Heating and Lighting Company | $799,108.85 | 60.766 | $95,735.57 |
| The Pintsch Compressing Co | 511,942.70 | 38.929 | 61,331.83 |
| Safety Export Company | 4,008.01 | 0.305 | 480.52 |
| Total | 1,315,059.56 | 100.000 | 157,547.92 |

## Schedule 14—Computation of Deficiency

| | |
|---|---|
| Total tax | $95,750.40 |
| Previously assessed | 95,735.57 |
| Deficiency | 14.83 |

## Schedule 15—The Pintsch Compressing Company, Computation of Deficiency

| | |
|---|---|
| Total tax | $61,341.33 |
| Previously assessed | 61,331.83 |
| Deficiency | 9.50 |

206 Schedule 16—Safety Export Company, Computation of Deficiency.

| | |
|---|---|
| Total tax | $480.59 |
| Previously assessed | 480.52 |
| Deficiency | .07 |

PETITIONER'S-PLAINTIFF'S EXHIBIT P-6

At a term of the United States District Court for the Western District of New York, held at the Court Rooms of the Court in the City of Buffalo, on the 15th day of February 1915.

Present: Honorable John R. Hazel, District Judge.

In Equity No. A-2 on U. S. Letters Patent No. 747686

THE SAFETY CAR HEATING & LIGHTING CO., PLAINTIFF

*vs.*

UNITED STATES LIGHT & HEATING COMPANY, DEFENDANT

Certified copy of decree filed February 15, 1915

The above-entitled cause having come on for hearing before the Honorable John R. Hazel, District Judge, after hearing Duell,
207 Warfield & Duell for the plaintiff, and Jones, Addington, Ames & Seibold for the defendant, and, after due consideration of the pleadings and the record, it is hereby

Ordered, adjudged, and decreed, That U. S. Letters Patent No. 747686, issued to John L. Creveling, December 22, 1903, for a System of Electrical Regulation, is, as to claims 1, 2, 3, 4, 5, 6, 7, 8 good and valid letters patent, and that said John L. Creveling was the first, true, and original inventor of the invention and improvement described and claimed in said letters patent and summed up in the aforesaid claims, it is further

Ordered, Adjudged, and Decreed, That the Safety Car Heating and Lighting Co. has been since August 1, 1907, and still is, the owner of the entire right, title, and interest in and to said letters patent No. 747686 and has the entire right to recover the damages and profits from all infringements thereof since the first day of August 1907. It is further

Ordered, Adjudged and Decreed that the defendant, United States Light & Heating Company, has infringed claims, 1, 2, 3, 4, 5, 6, 7, 8 of said letters patent No. 747686 by making, using, and selling to others to use the invention and subject-matter described and claimed in claims 1, 2, 3, 4, 5, 6, 7, 8 of said letters patent. It is further

Ordered, Adjudged, and Decreed That a perpetual injunction issue out of and under the seal of this Court, directed to and permanently enjoining and restraining the defendant, United States Light & Heating Company, its officers, receivers, clerks, servants, agents, attorneys and workmen, for the remainder of the life of said letters patent, from further infringing the same; and from directly or
208 indirectly making or causing to be made, using or causing to be used, or selling or putting into practice, operation or use the system of Electrical Regulation so as above adjudged to infringe said letters patent. It is further

Ordered, Adjudged, and Decreed, that the plaintiff recover from the defendants, United States Light & Heating Company, and its receivers, the damages sustained in or by reason of said infringement, as well as the profits, gains or savings made or realized by the defendant thereby, and that it be referred to J. William Ellis, Esq., of Buffalo, N. Y., as Master of this Court, to take and state the account of said gains, profits, and advantages and to assess such damages and to report thereon with all convenient speed; and the defendant, its receivers, officers, agents, and servants are hereby directed and required to attend before said Master from time to time as required, and to produce before him such books, papers, and documents, and to submit to such oral examination as the Master may require; and that the plaintiff do recover from the defendant and its receivers its costs and disbursements in this suit to be taxed.

JOHN R. HAZEL, *District Judge.*

209 PETITIONER'S-PLAINTIFF'S EXHIBIT P-7

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 2d day of July, one thousand nine hundred and fifteen.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

SAFETY CAR HEATING AND LIGHTING COMPANY, COMPLAINANT-appellee

*v.*

UNITED STATES LIGHT AND HEATING COMPANY, DEFENDANTS appellants

Order for Mandate

Filed July 20, 1915

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it is hereby affirmed with costs.

E. H. L.

210 It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A true copy.

WM. PARKIN, *Clerk.*

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PETITIONER'S-PLAINTIFF'S EXHIBIT P-8

At a Stated Term of the United States District Court, in and for the Western District of New York, held at the Court House in the City of Buffalo, within said District, on the 20th day of July 1915.

Present: Hon. John R. Hazel, United States District Judge.

In Equity A-2 on U. S. Letters Patent to Creveling No. 747686

THE SAFETY CAR HEATING & LIGHTING CO., PLAINTIFF

*vs.*

UNITED STATES LIGHT & HEATING COMPANY, DEFENDANT

Order Reinstating Injunction and Decree Referring Cause to Master to State the Account

Filed July 20, 1915

Whereas, at a stated term of this Court, held according to
211 law, this cause came on to be heard and argument was had by plaintiff and defendant, and the cause thereafter was taken under advisement by this Court; and

Whereas, on the 10th day of December 1914, this Court entered its decree in favor of the complainant, with costs, holding claims 1 to 8 of Letters Patent No. 747686, granted to John L. Creveling on December 22, 1903, to be good and valid, and holding that the defendant had infringed the same, and

Whereas, on the 15th day of February 1915, this Court entered its interlocutory decree embodying the terms of the judgment and decree aforesaid and referring the cause to J. William Ellis, Esquire, as Master of this Court, to take and state the account of said gains and profits and to assess damages between the plaintiff and the defendant as to the said infringement; and

Whereas, on the 17th day of February 1915, this Court entered its interlocutory injunction enjoining and restraining the defendants from their said infringement of claim 1 to 8, inclusive, of the aforesaid Letters Patent; and

Whereas, thereafter such proceedings were had that the defendants appealed from the said decision to the United States Circuit Court of Appeals for the Second Circuit; and

Whereas, thereafter, on the 25th day of February 1915, the defendants filed their bond upon appeal in the sum of Five Thousand Dollars ($5,000), which bond was approved by the Court and was ordered to operate as a supersedeas, staying the decree entered herein February 15, 1915, in all respects, as to the injunction as well as to the accounting and also as to costs; and

212 Whereas, thereafter such proceedings were had that on the 22d day of June 1915, the foregoing decree of the District Court was by the United States Circuit Court of Appeals for the Second Circuit in all respects affirmed, with costs; and

Whereas, thereafter, to wit, on the 16th day of July 1915, the mandate of the said United States Circuit Court of Appeals was received and filed in the office of the Clerk of this Court, now, after reading and filing the said mandate, and on motion of Frederic P. Warfield, Esq., as of counsel for the plaintiff in the foregoing cause.

It Is Ordered, Adjudged, and Decreed that the foregoing order of the 25th day of February 1915, whereby the bond on appeal was approved to operate as a supersedeas to stay the decree of February 15th, 1915, in all respects, as to the injunction as well as to the accounting and also as to costs, be and it is hereby revoked and annulled, except as to the approval of the bond; and the said injunction of February 17, 1915, and the said decree of February 15, 1915, are hereby in all respects reinstated, with costs in all Courts to plaintiff to be taxed.

JOHN R. HAZEL,
*United States District Judge.*

213 PETITIONER'S-PLAINTIFF'S EXHIBIT P–9

In the United States District Court, Western District of New York

In Equity A–2

THE SAFETY CAR HEATING & LIGHTING COMPANY, PLAINTIFF

*vs.*

UNITED STATES LIGHT & HEATING COMPANY, JAMES O. MOORE, JAMES A. Roberts, and J. Allan Smith, receivers, defendants

U. S. LIGHT & HEAT CORPORATION AND GUARANTY TRUST COMPANY OF New York, as Trustee, supplemental defendants

CLEMENT O. MINIGER, ELEANOR F. MINIGER, ELEANOR C. MINIGER, and The Ajax Investment Company, intervenors

Decree

Filed October 6, 1924

214 This cause having come on to be heard at this Term of this Court held at the Federal Building, Buffalo, New York, on the 6th day of October, 1924, and the report of J. William Ellis, the Special Master appointed herein, having been filed May 26, 1923, and exceptions thereto having been filed by the plaintiff and The United States Light & Heating Company and its receivers, and the exceptions having been heard and the Court having rendered its opinion thereon overruling the exceptions and confirming the Master's report and directing the entry of a decree for the amount awarded by the Master in the sum of $501,180.32 in favor of the plaintiff and against the defendant The United States Light & Heating Company and its receivers; and the plaintiff having filed a supplemental bill of complaint by leave of this Court bringing into this suit as additional defendants U. S. Light & Heat Corporation and Guaranty Trust Company of New York, Trustee under a certain mortgage made by U. S. Light & Heat Corporation to said Guaranty Trust Company of New York as trustee dated June 1, 1915, and recorded in the office of the Clerk of the County of Niagara, New York, on August 5, 1915; and said defendants having filed their answers; and the Court having allowed Clement O. Miniger, Eleanor F. Miniger, Eleanor C. Miniger and The Ajax Investment Company to intervene in this cause, and the cause having come on for a hearing before this Court, and the parties having appeared by their counsel

and presented their allegations and proofs, and said U. S. Light and Heat Corporation and said Guaranty Trust Company of New York as Trustee as aforesaid having moved the Court to dismiss the Supplemental Bill of Complaint, which motion came on for hearing at the time of the final hearing upon the issues raised by the answers to said supplemental bill of complaint; and after hearing George
215 Clinton, of counsel for plaintiff, Charles P. Franchot, of counsel for defendant U. S. Light and Heat Corporation, Ansley W. Sawyer, of counsel for Guaranty Trust Company of New York as Trustee as aforesaid, and Frank M. Coburn, of counsel for the intervehors Clement O. Miniger, Eleanor F. Miniger, Eleanor C. Miniger and The Ajax Investment Company, and all of the matters aforesaid having been submitted to the Court for its decision, and the Court, after due deliberation having rendered its decision in writing directing that a decree be entered herein as hereinafter provided, now on motion of Randolph Parmly, attorney for plaintiff, it is hereby

Ordered, Adjudged, and Decreed that U. S. Light & Heat Corporation and Guaranty Trust Company of New York as Trustee as aforesaid are proper parties to this suit and the motions to dismiss the supplemental bill of complaint be and the same are hereby denied and the intervening petition of Clement O. Miniger, Eleanor F. Miniger, Eleanor C. Miniger, and The Ajax Investment Company be and the same is hereby dismissed; and it is

Further Ordered, Adjudged, and Decreed that the exceptions filed by plaintiff and the defendants to the report of J. William Ellis, Special Master, be and the same are hereby overruled and that the said report be and the same hereby is in all respects confirmed; and it is

Further Ordered, Adjudged, and Decreed that the plaintiff recover from The United States Light and Heating Company and James O. Moore, James A. Roberts, and J. Allan Smith as Receivers of The United States Light and Heating Company (in their capacity as Receivers) and from U. S. Light and Heat Corporation, jointly and severally, the sum of Five Hundred and One Thousand One
216 Hundred and Eighty and 32/100 Dollars ($501,180.32) together with its costs, charges, and disbursements to be taxed; and it is

Further Ordered, Adjudged, and Decreed that the sum so decreed to be recovered shall be a lien prior and superior to the lien of the mortgage executed by U. S. Light & Heat Corporation to Guaranty Trust Company of New York as Trustee as aforesaid on all the assets and property of The United States Light & Heating Company which were sold under a decree of this Court in a suit wherein Central Trust Company of New York is plaintiff and The United States

Light & Heating Company is defendant (Docket Equity A–100), said decree being dated June 2, 1915, and filed in the Office of the Clerk of this Court on June 3, 1915, to which decree reference is hereby made with the same force and effect as if specifically set forth herein, and also a lien on all the property of U. S. Light & Heat Corporation; and it is

Further Ordered, Adjudged, and Decreed that the defendants, The United States Light & Heating Company, James O. Moore, James A. Roberts. and J. Allan Smith, as receivers thereof, and U. S. Light & Heat Corporation within sixty (60) days from the entry of this decree pay to the plaintiff the said sum of $501,180.32 with interest computed from the date of the entry of this decree, together with its costs, charges, and disbursements as taxed; and that if such payment be made the plaintiff shall execute a release and discharge of the lien declared by this decree in form for record and shall execute the same in duplicate, delivering one original thereof to the U. S. Light & Heat Corporation, and the other to the Guaranty Trust Company of New York, Trustee, as aforesaid, and it is

217 Further Ordered, Adjudged, and Decreed that in case of default in the payment of the sum above decreed to be paid within sixty (60) days from the date of the entry of this decree with interest from the date of the entry hereof and the costs, charges, and disbursements of plaintiff as taxed, then the plaintiff shall have leave to apply to this Court, upon notice to the other parties, for a further order for the carrying into effect of this decree; and it is

Further Ordered, Adjudged, and Decreed that all amounts paid by plaintiff to J. William Ellis, Special Master, on account of his fees as Special Master and on account of any disbursements incurred by him as such, shall be included in the costs to be taxed by the Clerk of this Court; and it is

Further Ordered, Adjudged, and Decreed that exceptions are allowed to the plaintiff and each and all of the defendants, supplemental defendants, and intervenors herein upon grounds which may be hereafter stated in their assignments of errors herein; and it is

Further Ordered, Adjudged, and Decreed that any party to this cause may at any time, on notice to the other parties, apply to this Court for further relief at the foot of this decree.

JOHN R. HAZEL,
*United States District Judge.*

218 PETITIONER'S-PLAINTIFF'S EXHIBIT P–10

United States District Court

Western District of New York

In Equity No. A–2

THE SAFETY CAR HEATING & LIGHTING CO., PLAINTIFF

*vs.*

UNITED STATES LIGHT & HEATING CO. AND JAMES O. MOORE, JAMES A. Roberts, and J. Allan Smith, Receivers, defendants

Report of J. William Ellis, Special Master

Filed May 26, 1923

*To the Honorable Judges of the District Court for the Western District of New York:*

Pursuant to the order of this Court dated February 15, 1915, and the further order of this Court dated June 12, 1916, referring this cause to the undersigned as Master, I respectfully report as follows:

* * * * * * *

Master's Report (Page M–64), Figures of the Account

The defendant's statement of account is Plff's. Ex. 1. This statement covers 5059 axle light equipments manufactured and sold
219 by the defendant which embodied stop-charge or taper-charge means for protecting the battery against overcharges. The defendant later introduced Deft's. Ex. 4–P, which sets forth a segregation of the profits made by the defendant and applied to the units of the equipments. In this Ex. 4–P an additional equipment omitted from Plff's. Ex. 1 is included, so that the accounting refers to 5,060 equipments.

These equipments were manufactured and sold during the period from Jan. 1, 1909, to April 30, 1914. The account is stated in five fiscal periods, which correspond with the accounting system of the defendant company.

The defendant's purpose in introducing its Ex. 4–P was to correct some clerical errors which had crept into the statement of account in connection with calculations concerning depreciation on patents and reserve for inventory adjustment and otherwise (D. B. 308). This Ex. 4–P was prepared by Mr. McVicker, an accountant.

For the purposes of this accounting the plaintiff admits the correctness of the Deft's. Ex. 4–P, and says in its brief (P. R. B., p. 35):

"This being an admission against interest, because it increases the amount of liability, we accept the change and think it will be proper for the Master to act upon the concession."

As restated by Mr. McVicker in this Ex. 4–P, the account for the several fiscal periods is as follows:

(a) In the first period of eighteen months from January 1, 1909, to June 30, 1910, 256 stop-charge and 107 taper-charge equipments were sold, making a total of 363. The net amount received for these equipments was $197,428.71 (Ex. 4–P, pg. 16); the cost was
220 $275,947.00 (Ex. 4–P, pg. A–14); and the loss was $78,518.29 (Ex. 4–P, pg. A–14).

(b) In the second period of twelve months from July 1, 1910, to June 30, 1911, 1,418 stop-charge and 156 taper-charge equipments were sold, making a total of 1,574. The net amount received was $796,448.58 (Ex. 4–P, pg. 14); the cost was $685,218.57 (Ex. 4–P, pg. A–14); the profit was $111,230.01.

(c) In the third period of twelve months from July 1, 1911, to June 30, 1912, 1,524 stop-charge and 34 taper-charge equipments were sold, making a total of 1,574. The net amount received was $750,591.06 (Ex. 4–P, pg. 9); the cost was $595,517.09; the profit was $155,073.97 (Ex. 4–P, pg. A–14).

(d) In the fourth period of twelve months from July 1, 1912, to June 30, 1913, 1,160 stop-charge and no taper-charge equipments were sold. The net amount received was $533,232.41 (pg. 4); the cost was $449,151.68 (Ex. 4–P, pg. A–14); the profit was $84,080.73 (Ex. 4–P, pg. A–14).

(e) In the fifth period of ten months from July 1, 1913, to April 30, 1914, 405 stop-charge and no taper-charge equipments were sold. The net amount received was $175,753.25 (Ex. 4–P, pg. 11); the cost was $219,850.40 (Ex. 4–P, pg. A–14); and the loss was $44,097.15.

The Master accepts this Exhibit 4–P as the basis of his findings as to the profits involved in this accounting.

The foregoing statement shows that there were five fiscal
221 periods involved in this account; and, further, that profits are shown during three of these periods as follows:

| | |
|---|---|
| Profits: | |
| (b) In the second period | $111,230.01 |
| (c) In the third period | 155,073.97 |
| (d) In fourth period | 84,080.73 |
| These make a total of | $350,384.71 |

The statement also shows there were losses incurred in two of the periods, as follows:

| | |
|---|---|
| Losses: | |
| (a) In first period | $78,518.29 |
| (e) In fifth period | 44,097.15 |
| These make a total of | $122,615.44 |

The law is clear that the defendant is liable for the profits resulting from its infringing acts, but the plaintiff is not liable for the losses which the defendant has thus incurred (141 U. S. 441; 97 U. S. 126; 94 U. S. 695).

The basic figure of admitted profits arising from the sale of the defendant's infringing stop-charge and taper-charge axle-light equipment is, therefore, the sum of $350,384.71. The next question presented is whether to the total sum of admitted profits there should be added other sums which have been improperly deducted by the defendant.

Before passing to this question, it should be here noted that the defendant has rendered no account of its profits or losses in manufacturing and selling its batteries. The plaintiff has accepted the account in this respect for the stated reason that it was in-
222 formed by defendant's counsel that there was a loss upon the battery end of the business in a very substantial amount (P. R. B., p. 43); a statement as to such loss is also found in Plff's. Ex. 1, paragraph (3).

The plaintiff has for the purposes of these proceedings admitted the substantial correctness of the account as summarized above.

* * * * * * *

Master's Report (Page M–84)

These various items, therefore, may be summarized as follows:

| | |
|---|---|
| For the First Period: | |
| Add on account of depreciation on patents | $125,301.79 |
| Deduct from this the loss for this period | 78,518.29 |
| Net profits for this period | 46,783.50 |
| For the Second Period: | |
| Add on account of depreciation on patents | 97,246.59 |
| Add the profits for this period | 111,230.01 |
| Total profits for this period | 208,476.60 |
| For the Third Period: | |
| Add depreciation on account of patents | 87,468.82 |
| Add profits for this period | 155,073.97 |
| Total profits for this period | 242,542.79 |
| 223 For the Fourth Period: | |
| Add on account of depreciation on patents | 85,437.72 |
| Add on account of interest on borrowed money | 8,397.00 |
| Add profits for this period | 84,080.73 |
| Total profits for this period | 177,915.45 |
| For the Fifth Period: | |
| Add on account of depreciation on patents | 71,041.39 |
| Add on account of interest on borrowed money | 5,679.45 |
| Total additions | 76,720.84 |
| Deduct total loss for this period | 44,097.15 |
| Net profits for this period | 32,623.69 |

Summarizing the profits for the various periods, the net result is as follows:

| | |
|---|---|
| Profits for first period | 46,783.50 |
| Profits for second period | 208,476.60 |
| Profits for third period | 242,542.79 |
| Profits for fourth period | 177,915.45 |
| Profits for fifth period | 32,623.69 |
| Total net profits for entire accounting period (D. E. 89, 90) | $708,342.03 |

* * * * * * * *

224 Master's Report (page M–104)

For the foregoing reasons, therefore, the Master finds that the several percentages to be applied to the three different items of the equipment cost are as follows:

| | |
|---|---|
| Generator | 49.376% |
| Panel | 21.378% |
| Other Equip | 29.246% |
| Total | 100% |

The Master has already found (*) that the total profits received by the defendant by reason of the infringing sales herein accounted for amounts to $708,342.03.

Adopting the McVicker cost method of apportioning profits, and applying to the total profits found (viz, $708,342.03) the percentage cost of the generator (viz, 49.376%), the Master finds that the total amount of profits to be credited to the plaintiff on account of the generator profits amounts to $349,800.34 (DE 112).

In like manner, applying to the total profits found (viz, $708,342.03) the percentage cost of the panel (viz, 21.378%), the
225 Master finds that the total amount of profits to be credited to the plaintiff on account of the panel profits amounts to $151,429.36 (DE 113).

The total of the generator profits and the panel profits amounts to $501,180.32 (DE 113a).

It is believed that the plaintiff is clearly wrong in figuring the total of the panel costs at 12.288% of the total cost. The plaintiff in reaching this percentage took the cost segregation appearing on pages 49 to 52 of the McVicker report and divided that total by the total costs in the device end of the business, which amounted to $2,227,098.53, as

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* On MR 85.

DE 112: This is a clerical error. The $708,342.03 multiplied by 49.376 percent gives $349,750.96 instead of $349,800.34. And the correct figure, $349,750.96, is the figure which, added to the panel profits of $151,429.36 (MR 105), produces the total that the master gives for generator profits plus panel profits, $501,180.32 MR 105). Aside from this clerical error in the amount, the amount is believed to be correct according to defendant's own proposed cost basis for apportionment and the exception should be overruled.

DE 113–113a: These figures are based on defendant's own proposed cost basis of apportionment, and it comes with ill grace from defendant to assert that the figures are not correct. These exceptions should be overruled. See foregoing brief, pages 41–76.

found in Plff's Ex. 1. This clearly seems to be an error on the part of the plaintiff, since the cost segregation appearing on pages 49 to 52 of the McVicker report include only material and labor costs and does not include the percentages of Manufacturing Overhead and General Establishment Expense, which should be prorated to these material and labor costs. Prorating these Manufacturing Overhead and General Establishment Expenses to the material and labor costs of the panel makes the difference between the 12.288%, figured by the plaintiff, and the 21.378%, figured by the Master.

CONCLUSION

The Master finds that the plaintiff has waived recovery for damages and has also waived recovery for profits due to sales of batteries in car-lighting equipments, and he makes no further finding thereon.

The Master fixes no date from which interest is to run, since
226 he knows of no authority giving him power to fix such date; neither does the Master make any recommendations as to costs, since it is believed that this matter is exclusively for the Court to determine (PE 4).

As a conclusion of fact and law on the whole case, and for the reasons herein set forth, which conclusion is based on the competent and material evidence herein, the Master awards the sum of $501,180.32 as accountable profits to be paid by the defendant to the plaintiff, and recommends judgment therefor.

The foregoing was first prepared as a draft report and furnished to counsel for each of the parties hereto. Sufficient time was then granted them within which to file with the Master their several exceptions to the report.

Thereafter counsel for each of the parties furnished the Master with their exceptions. Counsel for plaintiff filed in typewritten form four exceptions (*), and counsel for the defendants filed in like form one hundred and thirty-two exceptions to the report.

In accordance with the practice of this Court and if this Circuit, as the Master understands such practice, he submits below his action on such exceptions, and accompanying his report are the objections and exceptions interposed by counsel for each of the parties hereto.

* * * * * * *

Respectfully submitted.

J. Wm. Ellis, *Special Master.*

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PE 4: If the Master had power to fix the date from which interest on the award would run, he erred in not fixing the date as June 15, 1915 (the date of the C. C. A. decision on validity and infringement herein), or earlier. In any event, the Court certainly has power to specify the date, and it is submitted that the date should be June 15, 1915, or earlier, under the decisions. See foregoing brief, pages 39–40.

227 PETITIONER'S-PLAINTIFF'S EXHIBIT P–11

In the District Court of the United States for the Western District of New York

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT

*against*

THE UNITED STATES LIGHT & HEATING COMPANY, DEFENDANT

ORDER AND DECREE APPOINTING RECEIVERS

Filed July 22, 1914

Central Trust Company of New York, a corporation duly organized and existing under the Laws of the State of New York, and having its principal office at 54 Wall Street, Borough of Manhattan, City of New York, and a citizen of said State, having filed its petition, verified the 20th day of July, 1914 for leave to file its Bill of Complaint on its behalf and on behalf of all other creditors of The United States Light & Heating Company, defendant, above named, who may hereafter join in the prosecution of such suit, and praying for such other and further relief as to the Court should seem just, and said petition having duly come on to be heard and the prayer of said petition having been duly granted by the Court, and the said

228 Central Trust Company of New York having thereupon filed its said Bill of Complaint in the form annexed to said petition, verified July 20th, 1914, praying among other things for the appointment of a Receiver or Receivers of the said The United States Light & Heating Company, and for other and further relief as therein set forth, and the said defendant, The United States Light and Heating Company, having duly appeared and filed its answer in the Court, verified July 21st, 1914, admitting the truth of the allegations contained in said Bill of Complaint and consenting to the relief therein prayed for, and the complainant having appeared by Joline, Larkin, and Rathbone, Esquires, its solicitors Albert Stickney, Esq., of Counsel, and the defendant having appeared by Dos Passos Brothers, its attorneys, Louis S. Posner, Esq., of Counsel, Frederick R. Humpage, a stockholder, having appeared by Adolph Rebadow, Esq., his counsel, A. Henry Ackerman having appeared by Clark H. Timmerman, Esq., his counsel, and Picher Lead Company, John Sundberg and William K. Knight having appeared by Alfred W. Gray, Esq., their counsel:

Now upon reading and filing the said Petition, Bill of Complaint, and Answer, and after hearing Albert Stickney, Esq., of Counsel for the Complainant, in support of the motion, and Alfred W. Gray, Esq., Solicitor for Picher Lead Company, John Sundberg and William K. Knight, and Clark H. Timmerman, Esq., Counsel for A.

Henry Ackerman, and Adolph Rebadow, Esq., Counsel for Frederick R. Humpage, in opposition thereto,

On motion of Joline, Larkin, and Rathbone, Solicitors for the Complainant,

It is Ordered and Decreed that James O. Moore, Esq., of Buffalo, N. Y., and James A. Roberts, Esq., of the City of New York,
229 be and they are hereby appointed Receivers of all the property and assets, real, personal, and mixed, of whatever kind and description, and wheresoever situate, owned by said defendant, The United States Light & Heating Company, including all lands, buildings, and appurtenances of every kind; all equipment, tools, machinery, furniture, fixtures, materials, and supplies of every sort and description on hand, goods, wares, and merchandise manufactured and in process of manufacture, and all books of account, records, and other books, papers, accounts, vouchers, cash in bank, on deposit, and in hand, money, debts, things in action, bills and accounts receivable, credits, stocks, bonds, securities, contracts, leases, deeds, muniments of title, rents, issues, profits and income accrued, accruing, or to accrue, as well as all rights, privileges, easements, and franchises of every nature and description, and all patents and letters patent, whether issued or applied for, inventions, processes, and formulas of every description, and all other property and assets of the said defendant of every sort, nature, and description, and wheresoever situate, and whether included in the specific description aforesaid or otherwise; with power to said Receivers to take and enforce, wherever necessary, possession and title to any and all property and assets belonging to said defendant or held for its account in any other jurisdiction; with power to said Receivers to apply for and obtain the appointment of one or more ancillary Receivers.

It is Further Ordered and Decreed that the said Receivers shall have full power and authority to operate the plant or plants of the defendant; to sell and dispose of its products, and to collect and receive rents, issues, and profits thereof, and to apply said income and receipts thereof under the order or decree of this Court until the further order of the Court; to protect and preserve
230 the corporate franchises, rights, and privileges, and to preserve the corporate existence of the defendant, to bring such actions, suits, and proceedings as may be necessary or appropriate to execute or enforce any of the powers herein given to said Receivers; to intervene in and defend any actions, suits, or proceedings which may now exist or may be hereafter commenced against said defendant or any of its property or franchises; with further power to said Receivers from time to time to employ and discharge and to compensate such officers, agents, servants, attorneys, and other employees as may be necessary to execute or enforce any of the powers aforesaid; to effect such fire, casualty, and other insurance as may be advisable in such companies as may be determined, and to pay and discharge premiums therefor; to make, execute, and deliver such contracts, and other in-

struments as may be necessary or appropriate in the fulfillment of any of the foregoing powers; from time to time to purchase and pay for such goods, wares, and merchandise and supplies as may be necessary or appropriate to carry on the business and business operations of defendant as a going concern; together with any and all other powers and authority incidental to the foregoing powers whether expressed or otherwise, including any and all other powers usually granted to Receivers in such cases, and

It is Further Ordered and Decreed that pending this suit, the defendant, The United States Light & Heating Company, its directors, officers, agents, and employees, and all persons claiming by, under, or through the defendant, and all creditors and claimants against the defendant, their respective agents, servants, and employees, be, and they are hereby, restrained and enjoined from interfering with said Receivers or with the property of the said defendant and from
231 commencing any action, suit, or proceeding against said defendant and from further prosecuting any other actions or suits previously commenced and from filing any processes, liens, or attachments against the defendant or its property; and the defendant, its directors, officers, agents, and employees, are hereby directed to turn over and surrender to said Receivers all property, assets, books, documents, and papers of said defendant.

It is Further Ordered and Decreed that said Receivers before entering upon the discharge of their duties execute and acknowledge in the usual form and file with the Clerk of this Court their joint and several bond in the penal sum of One Hundred Thousand Dollars ($100,000) with some sufficient surety, to be approved by the Judge of this Court, conditioned for the faithful discharge of their duties as such Receivers; and

It is Further Ordered and Decreed that said Receivers deposit all funds of the corporation not needed for immediate use and disbursement in one or more of the following banks or trust companies, to wit: Manufacturers and Traders National Bank of Buffalo, Power City Bank, and Niagara Falls Trust Co.

It is Further Ordered and Decreed that any of the parties to this action, or the Receivers hereby appointed, may apply at the foot of this decree for any other or additional relief which to the Court may seem just.

JOHN R. HAZEL,
*District Judge.*

Dated Buffalo, N. Y., July 22, 1914.
JRH DJ.

232 PETITIONER'S-PLAINTIFF'S EXHIBIT P-12-a

At a stated term of the United States District Court for the Western District of New York, held at the Federal Building in the City of Buffalo, New York, on the 2nd day of June, 1915.

Present: Honorable John R. Hazel, District Judge.

District Court of the United States for the Western District of New York

In Equity

CENTRAL TRUST COMPANY OF NEW YORK, PLAINTIFF

*against*

THE UNITED STATES LIGHT & HEATING COMPANY, DEFENDANT

This cause having duly come on to be heard on the 30th day of March 1915, upon the motion of James O. Moore, James A. Roberts, and J. Allan Smith, receivers of the above-named defendant, duly appointed herein, and of the Central Trust Company of New York, complainant herein, and the same having been presented to the Court upon due notice to all parties entitled thereto, and there being no opposition, and it appearing from the affidavits heretofore filed herein and the proofs of claims filed with the Receivers and the reports of said Receivers that the defendant company is indebted to
233 numerous creditors, and there are outstanding claims against defendant, amounting in the aggregate to approximately Seven Hundred and Sixty Thousand Dollars ($760,000), and an order having been made in the above-entitled cause amending the order made herein on the 22nd day of July, 1914, by providing for the winding up of said corporation, and it appearing to the Court that it is necessary to sell the property of the defendant as hereinafter specified, in the manner herein directed, and that the proceeds of such sale, after deducting therefrom the costs and expenses of said sale and of this suit and of such other charges as the Court may direct, shall be applied so far as necessary to the payment of the said indebtedness of the defendant, The United States Light and Heating Company of Maine, and the remainder, if any, be paid to the parties entitled thereto, and the Court being advised in the premises, does upon motion of Adolph Rebadow and Morris Cohn, Jr., counsel for the Receivers hereinbefore named, and of Messrs. Joline, Larkin & Rathbone, Solicitors for the Complainant herein, and Alfred W. Gray, Esq., Solicitors for Intervening Creditors, consenting thereto, and no other parties appearing or opposing.

Order, Adjudge, and Decree as follows:

1. That James O. Moore, James A. Roberts, and J. Allan Smith, Receivers of the defendant heretofore appointed in this cause by orders of this Court, dated the 22nd day of July, 1914, and the 20th day of February, 1915, as amended by the order of this Court bearing even date herewith, are hereby authorized and directed, as such Receivers, to sell at public auction as hereinafter provided, subject, however, to any taxes or assessments which may be liens
234 thereon, all and every the real estate, buildings, plant, machinery, tools, materials, supplies, furniture, fixtures, manufactured and unmanufactured stock, accounts and bills receivable,

stock of other corporations, inventions, patents, claims for royalties, claims for damages and profits, for infringements of patents, suits relating to inventions and patents and claims therein, applications for patents, licenses, trade marks, contracts, business, goodwill, claims, causes of action, and other assets now or heretofore of the defendant, wherever situate, as the same shall exist as a going concern on the 1st day of July, 1915, excluding, however, any and all claims and causes of action arising out of the alleged misconduct of promotors, directors, and officers of the defendant, The United States Light and Heating Company, and their associates and agents, and excluding cash in the hands of said Receivers.

2. The sale herein authorized shall be made at public auction to the highest bidder, whose bid shall have been entertained as hereinafter provided, and shall take place at the plant of said Company, and premises hereinafter described, near Highland Avenue in the City of Niagara Falls, New York, on the 1st day of July, 1915, and at such hour between 9 A. M. and 5 P. M. as may be designated by the Receivers in the notice of sale hereinafter specified, and that notice of the time and place of such sale in a form to be approved by the Court, which shall, among other things, refer to this order or decree, and any amendment thereof, and shall contain a brief general description of the property to be sold, shall be published once a week for four successive weeks preceding the date of sale in the following newspapers, viz:

235 Niagara Falls Gazette, a daily newspaper published in the City of Niagara Falls, New York.

Niagara Falls Journal, a daily newspaper published in the City of Niagara Falls, New York.

Buffalo Commercial, a daily newspaper published in the City of Buffalo, New York.

Said Receivers are directed to cause such publications to be made.

Any such sale may be adjourned by the Receivers, with the consent of the committee of stockholders of the defendant, at the time and place of sale by oral announcement thereof, and without further order of the Court, and such sale may take place at the adjourned date or dates thereof without further notification or order, and in every respect as though such sale had been ordered by this decree at such adjourned date.

3. No bid shall be received or entertained by such Receivers unless accompanied by cash or by a check drawn to the order of the Receivers and certified by a National Bank or Trust Company of the State of New York, acceptable to the Receivers in the amount of Fifty Thousand Dollars ($50,000).

Deposits received from an unsuccessful bidder shall be returned to him by the Receivers upon the final rejection of his bid. Deposits received from the successful bidder or bidders shall be applied on account of the purchase price of the property sold. If the Court shall not confirm the sale for which a deposit shall have been made such deposit shall be returned to the bidder.

In case any bidder shall fail to make good his bid upon its acceptance and shall fail, after such acceptance, to comply with any
236 order of the Court relating to the payment thereof on the confirmation of the sale, then the sums deposited by such bidder shall be kept and retained finally and absolutely by the Receivers as and for liquidated damages and not by way of penalty, it being expressly adjudged that the damages so suffered by the Receivers will be sustained, but incapable of exact ascertainment.

No bid lower than an amount sufficient, with other cash in the Receivers' hands, available for such purpose, to provide for the payment in full of all debts of defendant shown on its books, or otherwise proved to the satisfaction of defendant with any interest properly payable thereon, plus the costs and expenses of the receivership, and allowed by the Receivers, as nearly as the same can be estimated shall be received or entertained by the Receivers.

4. Any such bid shall specify a stated sum or sums as the amount of the bid, and shall state the amount of such sum which is to be paid in cash and the amount of such sum which is to be paid by application upon the purchase price of claims of creditors of the defendant whose claims have been allowed by the Receivers, or otherwise proved, and of preferred stock or common stock of the defendant as hereinafter more fully provided. Any such bid shall provide for the purchase of the properties to be offered for sale in pursuance of this decree, subject to all the obligations and indebtedness of the Receivers as of said July 1st, 1915, and the Court reserves the right to make such orders and decrees in respect to the payment or the assumption of payment by the purchaser of such obligations and indebtedness, or in respect to the conditions upon which title or possession of the properties sold shall be transferred, and in general to make such provisions for the payment and satisfaction of the
237 obligations and indebtedness of the Receivers as to the Court may seem proper. The Court reserves the right to consider, act upon, and make such orders in respect to any and all bids in whatever form said bids may be as to it may seem proper, provided only that the respective bidders shall comply with the provisions of this decree.

5. In the event the successful bidder for said property shall be the owner of any claims against said defendant company, and said claims shall have been allowed by the Receivers, or otherwise proved, then and in that event the said claims so held by such bidder shall when accompanied by written evidence satisfactory to the Receivers or their counsel of the due transfer and assignment of such claims, or their satisfaction, release or discharge, be credited on the payment of said purchase price to the extent of the amount, of such proved and allowed claim, unless the purchase price, over and above all expenses of such Receivership, shall be less than the total amount of all the claims and obligations of the defendant, in which event, to such an amount or percentage of such proved and allowed claim so transferred, assigned, satisfied, released, or discharged as the pur-

chase price applicable to the payment of debts over and above all expenses of such receivership shall bear to the total claims and obligations of said Company, with any interest properly payable thereon.

6. In the event the said property of the defendant shall be sold for more than the face amount of all the claims and obligations against the defendant company, with any interest properly payable thereon, and the expenses of the receivership herein, and the successful bidder and purchaser thereof shall be the owner or holder, or representative of the owner or holder of any of the preferred stock of the
238 defendant company entitled to a preference in payment upon a disposition of the assets of the defendant in liquidation, or of any common stock entitled to share in the assets of the defendant in liquidation after full payment of the preferred stock so entitled, then and in that event such successful bidder and purchaser shall be entitled to apply such preferred stock and such common stock in order of their right to payment, so held or controlled by such successful bidder or purchaser to the payment of the purchase price at such rate per share as the Court may find and adjudge to be probably distributable thereon out of the proceeds of the total price paid in excess of the amount necessary to pay all the claims against the defendant, and the expenses of the receivership herein.

7. The Court expressly reserves the right to adjourn the sale for such period or periods and to such place or places as it may determine, to direct the acceptance or rejection of any or all bids received, to confirm or direct the consummation of any and all sales in accordance with the provisions of this decree, and of any bid or bids accepted, and to take such other or further action, and make such other or further orders or decrees in relation to any matters whether or not herein specifically disposed of as to it may seem proper.

8. The purchaser or purchasers of the property herein directed to be sold, whose bid or bids shall have been accepted, shall, on confirmation of the sale by the Court, make such further payment or payments in cash or otherwise on account of the purchase price thereof at the times and in the manner as the Court may from time to time direct. Any and all amounts of cash so received on account of the purchase price shall be deposited by the Receivers in Guaranty Trust Company of New York, to their credit as Receivers of
239 the defendant company, such cash, together with the cash on hand herein excepted from sale, to be applied in accordance with the further order of this Court.

The Court reserves the right to resell or order the resale of all or any of the property herein directed to be sold upon such notice as the Court may direct in case the successful bidder or bidders shall fail or omit to make any payment on account of the purchase price within twenty days after entry of an order requiring such payment or within such other time as the Court may hereafter direct. The purchaser or purchasers, his or their or its successors and assigns, shall not be required to see to the application of the purchase money

and shall have the right to enter his, their, or its appearance in this Court and to become a party or parties to this cause.

10. Upon the confirmation of such sale or within twenty days thereafter, and upon payment of the purchase price by the purchaser or purchasers, his or their successors and assigns, or upon making such provision for the payment thereof as the Court may approve, the Receivers shall execute a deed or deeds, bills of sale, assignments, transfers of letters patent, or other rights in respect of patents and of suits, claims, or damages in respect of patents and substitutions therein, or other proper instruments, in such form as shall, before the delivery thereof, be approved by order of this Court, conveying, assigning, and transferring the property purchased, together with such particular description thereof as may be desirable to such purchaser or purchasers, or his or their successors, assigns or nominees, and such purchaser or purchasers, his or their successors, assigns, or nominees, at such time and upon such conditions as this Court may hereafter direct, shall be let into the possession of any or all of said property, and shall thereafter hold, possess, and enjoy
240 the said property free from any and all estate, right, title, claim, demand, interest, or equity of redemption of, in or to the same, of the defendant herein, its respective creditors and stockholders, and any and all persons, firms, or corporations claiming by, through, or under them or any of them, subject only to the right of the Court as herein especially reserved, to retake possession of and to resell such property in case the said accepted bidder or bidders shall fail to comply, after due order, with any of the terms and conditions of sale.

11. The defendant shall at the time of the execution of such deed or deeds or other instruments by the Receivers, as a further assurance to the purchaser or purchasers, his or their successors, assigns, or nominees, execute and deliver such other or similar deed or deeds, bills of sale, assignments, transfers of letters patent, or other rights in respect of patents and of suits, claims, damages, or profits in respect of patents, and substitutions therein, or other instruments to be approved by the order of this Court, or join with the Receivers in the execution of the deed or deeds, bills of sale, assignments, transfers, substitutions, or other instruments to be made by them, and shall thereby convey, transfer, assign, and release to the purchaser or purchasers, his or their successors, assigns, or nominee, all its estate, right, title, claim, demand, interest, and equity of redemption of, in, and to the property sold, conveyed, assigned, or transferred to such purchaser or purchasers, his or their successors, assigns, or nominees, by the Receivers, and said defendant shall also prosecute or defend to final judgment in its own name, but for the benefit and at the sole expense of said purchaser or purchasers, any and all suits and causes of action so transferred pending, or which may best be so
241 prosecuted or defended in the name of the defendant after such purchase shall be consummated.

12. The purchaser shall assume all unmatured obligations of the defendant, The United States Light and Heating Company, arising out of the operations of the plant and business of the defendant as a going concern, including all claims for damages for alleged infringement by the defendant of any Letters Patent of the United States excepting, however, any unmatured obligations under contracts, leases, or licenses to or with the defendant in respect of which the receivers shall have rejected or disallowed any claims against the defendant filed with said Receivers, and excepting also that the purchaser or purchasers, his or their successors, assigns, or nominees may at any time within sixty days from the date of delivery of possession to him or them by the Receivers, elect whether or not to adopt or assume any lease of real estate, or license under Letters Patent, which may be included in the property sold or which may constitute an incident or appurtenance thereof, and which is susceptible, in law, of disaffirmance or rejection by the defendant, and such purchaser or purchasers, his or their successors, assigns, or nominees, shall not be held to have accepted or assumed any such lease or license which he, it, or they shall not so elect to accept or assume. Such elections shall be made by an instrument in writing subscribed by the purchaser or purchasers, his or their successors, assigns, or nominees, and be filed in the office of the Clerk of this Court, and no conduct or use of rights by any purchaser or purchasers, his or their successors, assigns, or nominees, within such period of sixty days, unaccompanied by the filing of such written instrument, shall be deemed to conclude such purchaser or
242 purchasers, his or their successors, assigns, or nominees, in respect of such election.

13. The funds arising from the sale of the property herein directed to be sold having been deposited by the Receivers, as hereinbefore provided, together with the cash on hand herein excepted from the sale, shall be applied in accordance with the further order of this Court. All questions in relation to the payment and distribution of said funds, or other funds in the Receivers' hands, allowances to the parties hereto, and to the Receivers and their counsel, the determination of the claims, rights, equities, and priorities of creditors and stockholders, and in general all questions as to the time and manner of distribution being hereby reserved for future hearing and determination upon such notice as the Court may hereafter direct.

14. All questions not hereby disposed of are reserved for future hearing and determination. Any party to this cause may at any time apply to this Court for further relief at the foot of this decree.

15. Nothing herein contained shall prejudice any right, claim, or cause of action vested in the defendant company or in the Receivers and this order and any sale had pursuant thereto is hereby made without prejudice to any and all such rights, claims, and causes of action, whether now or hereafter existing or prosecuted.

The following is a description of the property hereinbefore and now directed to be sold:

All That Tract or Parcel of Land, situate in the City of Niagara Falls, County of Niagara and State of New York, being part of Lot No. Thirty-four (34) of the Mile Reserve, so-called, bounded and described as follows: Beginning at the intersection of the north line of Lot No. Thirty-four (34) Mile Reserve with
243 the west line of Fifteenth Street, a distance eight hundred thirty-six and fifty-one hundredths (836.51) feet west of the Mile Line; thence westerly along the north line of Lot No. Thirty-four (34) Mile Reserve, distance six hundred seventy-two and seventy-three hundredths (672.73) feet to the center line of an alley which is one hundred sixty-five and seventy-five hundredths (165.75) feet east of the center line of Highland Avenue and parallel to it, thence at an angle of one hundred ten degrees (110), nineteen (19) minutes and forty-nine (49) seconds in a southwesterly direction along the center line of the alley five hundred ninety-six and forty-nine hundredths (596.49) feet; thence at an angle of seventy degrees (70) nineteen (19) minutes in an easterly direction eight hundred seventy-four and fifty-seven hundredths (874.57) feet to the west line of Fifteenth Street; thence at an angle of eighty-nine (89) degrees, fifty-four (54) minutes and thirty (30) seconds in a northerly direction along the west line of Fifteenth Street five hundred sixty-nine and twelve hundredths (569.12) feet to the point of beginning, containing ten and thirty-one thousands (10.031) acres, more or less.

Also

All That Other Tract or Parcel of Land, situate in the City of Niagara Falls, County of Niagara and State of New York, being part of Lot No. Thirty-four (34) of the Mile Reserve, so-called, bounded and described as follows: Beginning at a stone monument in the north lot line of Lot No. Thirty-four (34) Mile Reserve, at a distance of two hundred eighteen and fourteen hundredths (218.14) feet west of the Mile Line of the Mile Reserve; thence in a southerly direction nine hundred one and fifty-seven hundredths (901.57) feet
244 on a line parallel to and one hundred twenty (120) feet west from the west line of Seventeenth Street, to a stone monument in the center line of Beech Avenue; thence at an angle of eighty-nine degrees (89) and eleven minutes (11) in a westerly direction along the center line of Beech Avenue to the east line of Fifteenth Street, a distance of five hundred sixty-five and ninety-seven hundredths (565.97) feet; thence at an angle of ninety degrees (90) nineteen minutes (19) and fifty-six seconds (56) in a northerly direction along the east line of Fifteenth Street a distance of eight hundred ninety-two and eighty-four hundredths (892.84) feet to the north lot line of Lot No. Thirty-four (34) Mile Reserve; thence at an angle of ninety degrees (90), thirty-three minutes (33) and nineteen seconds (19) in an easterly direction along the north lot line of Lot No. Thirty-four (34) of Mile Reserve, a distance of five

hundred fifty-eight and thirty-seven hundredths (558.37) feet to the point of beginning, containing eleven and four hundred fifty-five thousands (11.455) acres, more or less, exclusive of the part of Beech Avenue included in said description.

Also

All That Other Tract or Parcel of Land, situate in the City of Niagara Falls, County of Niagara and State of New York, known as and being Lot No. Eight (8) in Block Twelve (12) on the east side of Highland Avenue as said lot and block are laid down on a map of part of Lots Thirty-three (33) and Thirty-four (34) New York Mile Reserve, owned by the Highlands Land Company, made by Julius Frehsee, Surveyor, October 19th, 1895, and filed in Niagara County Clerk's Office June 8th, 1896, together with all the right, title
245 and interest of the company in and to Highland Avenue, Tennessee Avenue and the alley in the rear of said lot and block as said avenue, alley and block are shown on said map.

Also

All That Other Tract or Parcel of Land, situate in the City of Niagara Falls, County of Niagara and State of New York, known as and being Lot No. One (1) in Block No. Thirteen (13) on the east side of Highland Avenue, as said lot and block are shown on "Map of parts of Lots 33 and 34 New York State Reserve, owned by the Highlands Land Company, made by Julius Frehsee, Surveyor, October 18, 1895", "copied with changes by Porter, Jones and Schaffer, Civil Engineers, September, 1897", and filed in Niagara County Clerk's Office.

Also

All That Other Tract or Parcel of Land, situate in the City of Buffalo, County of Erie, and State of New York, being part of Block No. One Hundred and Ninety-two (192) of the New York State Reservation, and land immediately south thereof, and bounded and described as follows:—Beginning at a point in the northerly line of Massachusetts Avenue, as a four-rod street, where the same would be intersected by the easterly line of said Block No. One Hundred Ninety-two (192) extended, which point is distant easterly about three hundred and thirty-one (331) feet from the point of intersection of the easterly line of Lawrence Place (formerly Sixteenth Street) and the said northerly line of Massachusetts Avenue, and is distant westerly one hundred and fifty-one (151) feet
246 westerly from the point of intersection of the westerly line of Winter Street with the said northerly line of Massachusetts Avenue, as a four-rod street; running thence from said place of beginning, northerly, and along the easterly line of Block No. One Hundred Ninety-two (192) five hundred and ten (510) feet, to a point one hundred and twenty (120) feet southerly from the southerly line of Hampshire Street, as a four-rod street; thence westerly, along a line parallel with the southerly line of Hampshire Street, one hundred and eighty-one and one-half (181½) feet to a line

midway between the easterly and westerly bounds of said block No. One Hundred and Ninety-two (192); thence southerly, along the said line midway between the said easterly and westerly bounds of said block one hundred ninety-two (192), one hundred and ninety-five (195) feet, to the center of said Block No. One Hundred Ninety-two (192), thence westerly and along a line midway between the northerly and southerly bounds of said block one hundred ninety-two (192) ten (10) feet, to a point one hundred and thirty-nine (139) feet easterly from the easterly line of Lawrence Place (formerly Sixteenth Street); thence southerly and parallel with the easterly line of Lawrence Place, about one hundred and sixty-four (164) feet, to a point one hundred and fifty-one (151) feet northerly from the northerly line of Massachusetts Avenue; thence westerly, parallel with the northerly line of Massachusetts Avenue one hundred and thirty-nine (139) feet to the easterly line of Lawrence Place (formerly Sixteenth Street); thence southerly along the said easterly line of Lawrence Place, sixty-one (61) feet, thence easterly and along a line parallel with the northerly line of Massachusetts Avenue, one hundred and forty-three and one-half (143½) feet; thence southerly, and along a line parallel
247 with the easterly line of Lawrence Place, ninety (90) feet, to the northerly line of Masachusetts Avenue, as a four-rod street; thence easterly along the said northerly line of Massachusetts Avenue one hundred and eighty-seven and one-half (187½) feet to the point or place of beginning, including all buildings on the several described parcels of land, and all plant, machinery, fixtures, appliances, tools, and furniture there or elsewhere contained, together with all books, stationery and or contract rights in respect of said land and buildings, subject to all exceptions and reservations contained in the deeds of said premises to The United States Light and Heating Company; also all stock of materials on hand, all manufactured and unmanufactured goods, all bills receivable and accounts receivable, stock of other corporations, all trademarks, inventions, letters patent, applications for letters patent, licenses under letters patent, royalties accrued, and all suits, causes of action and claims for royalties or damages and profits in respect of any of said inventions, letters patent or licenses; also all secret processes, unfilled orders, contracts and contract rights, business, goodwill and property of said The United States Light and Heating Company, and or of James O. Moore, James A. Roberts, and J. Allan Smith, as Receivers of The United States Light and Heating Company, as of the first day of July, 1915, excluding and excepting from the property so to be sold, any and all claims and causes of action arising out of the alleged misconduct of promoters, directors, and officers of the defendant, The United States Light and Heating Company, and their associates and agents, and excluding and excepting also, from the property so to be sold, cash in the hands of said Receivers.

JOHN R. HAZEL,
*United States District Judge.*

248 PETITIONER'S-PLAINTIFF'S EXHIBIT P–12–B

Memorandum of Purchase and Sale, United States District Court for the Western District of New York

In Equity

CENTRAL TRUST COMPANY OF NEW YORK, PLAINTIFF

*against*

THE UNITED STATES LIGHT & HEATING COMPANY, DEFENDANT

The undersigned, being the highest bidder upon the public sale of the property exposed for sale as described in the annexed notice, does hereby accept the terms and conditions of such sale as specified in the order of the Court made herein on June 2, 1915, and agrees to be bound thereby and covenants and agrees to purchase the property aforementioned according thereto and to the notice given by the receivers at the time and place of sale, a copy whereof is hereto attached, for the sum of One Million One Hundred Dollars ($1,000,100), payable as follows:

Proportions to be Modified by Permission of Court

| | |
|---|---|
| In cash | $500,050 |
| By the application upon the purchase price of claims of creditors of the defendant and otherwise under subdivision 4 of the decree of June 2, 1915 | $500,050 |

249 A certified check upon the Guaranty Trust Company of New York for $50,000 has been deposited with the receivers upon their entertaining the bid of the undersigned, and shall be retained and applied by them in accordance with the terms of said order.

Dated: JULY 1, 1915.

On behalf of the Reorganization Committee by

WALSTON H. BROWN,
*Purchaser, Chairman.*

Received of Stockholders Protective Committee by Walston H. Brown, Chairman, a certified check for Fifty Thousand Dollars ($50,000) on account of their bid for the premises and property described in the annexed notice of sale, as specified in the foregoing memorandum of purchase thereof.

Dated: NIAGARA FALLS, N. Y.
*July 1, 1915.*

JAMES O. MOORE,
JAMES A. ROBERTS,
J. ALLAN SMITH,
*As receivers of the United States Light & Heating Company.*

Filed July 12, 1915, being part of Receivers' Report of Sale.

250 PETITIONER'S-PLAINTIFF'S EXHIBIT P-12-c

Filed August 2, 1915

At a stated term of the United States District Court, for the Western District of New York, held at the Federal Building in the City of Buffalo, New York, on the 31st day of July, 1915.

Present: Honorable John R. Hazel, District Judge.

District Court of the United States for the Western District of New York

In Equity

CENTRAL TRUST COMPANY OF NEW YORK, PLAINTIFF

*against*

THE UNITED STATES LIGHT & HEATING COMPANY, DEFENDANT

Upon reading and filing the report of James O. Moore, James A. Roberts, and J. Allan Smith, receivers of the defendant, The United States Light and Heating Company herein, duly verified on the 8th and 9th days of July, 1915, together with the exhibits and documents attached thereto, and the notice of motion made herein under date of July 8th, 1915, with due admission of service thereof by the plaintiff, the defendant, the Stockholders' Protective Committee,
251 and certain intervening creditors, and upon reading and filing the affidavit of Morris Cohn, Jr., and Adolph Rebadow, counsel for the receivers herein, verified July 12, 1915, and it appearing from said report that said receivers did, in pursuance of the order of this Court, made on the 2nd day of June, 1915, advertise and expose for sale the property of the defendant therein directed to be sold, at public auction, to the highest bidder, at the plant of said company in the city of Niagara Falls, New York, on the 1st day of July, 1915, at 11 o'clock in the forenoon, and that upon such sale said premises and property so directed to be sold were struck down to Walston H. Brown, Crawford Livingston, Albert N. Parlin, Charles R. Dalgleish, and Herbert V. Falk, as and constituting a Stockholders' Protective Committee of the defendant, for the sum of One Million One Hundred Dollars ($1,000,100) said committee being the highest bidder for said property, and said sum being the highest sum bid therefor, and it appearing that said successful bidder has duly executed and delivered to said receivers a certified check of Fifty Thousand Dollars ($50,000) in accordance with said order of sale, which sum has been duly deposited by the receivers with the Guaranty Trust Company of New York, and it further appearing from said report that the amount of such bid, together with cash in the hands of said receivers, amounting to the sum of upwards of One Hundred Thousand Dollars ($100,000) is more than sufficient,

in the judgment of said receivers, to pay in full the debts, claims, and demands against said company filed and allowed or otherwise proved herein, together with any interest payable thereon, and the costs and expenses of said receivership, and that said receivers have duly advertised for the presentation of claims, the time for which
252 presentation expired on the 6th day of April, 1915, and that it will be desirable and in the interest of all parties, that all claims that have been filed, allowed, or otherwise proved, shall be promptly paid, and that the fees of the receivers and their counsel be fixed and allowed, and that the same be paid, and after hearing Morris Cohn, Jr., and Adolph Rebadow, counsel for the receivers in support of this application, Reed, Gwinn & Deming, counsel for the defendant, The United States Light and Heating Company; Guy M. Walker, counsel for Stockholders' Protective Committee, and Alfred W. Gray, counsel for intervening creditors, also appearing, and said receivers, James O. Moore and James A. Roberts also appearing in person;

Now, upon motion of Morris Cohn, Jr., and Adolph Rebadow, counsel for James O. Moore, James A. Roberts, and J. Allan Smith, receivers of the defendant herein, it is

Ordered:

1. That the report of said receivers be and the same is in all things approved.

2. That the bid of One Million, One Hundred Dollars ($1,000,100) of Walston H. Brown, Crawford Livingston, Albert N. Parlin, Charles R. Dalgleish, and Herbert V. Falk, as and constituting a Stockholders' Protective Committee of the defendant, for the premises and property directed to be sold by the order of this Court under date of June 2, 1915, that being the highest sum bid upon such sale, and they being the highest bidders thereat, be and the same is accepted, and the sale so made be in all things confirmed, and that upon the payment of the unpaid portion of the purchase price of said premises and property, the receivers and the defendant shall execute a deed or deeds, bills of sale, assignments, trans-
253 fer of letters patent, or other rights in respect of patents, and all suits, claims, and demands in respect of patents and substitutions therein and other proper instruments, conveying, transferring, and assigning the premises and property purchased to the said Stockholders' Protective Committee or to the U. S. Light and Heat Corporation, a Corporation of New York, as nominee and assignee of said Committee, as directed by said order of sale of June 2, 1915, the form thereof to be first approved by this Court to contain such conditions and provisions as may be suitable and proper.

3. Said receivers are hereby directed to operate the plant and property of the defendant in their possession for and on account of the Stockholders' Protective Committee, its assigns and nominees, until the full payment of the purchase price so bid, or until the further order of this Court.

4. It appearing from said report and the papers attached thereto that the amount of said accepted bid, together with the cash in the receivers' hands available to the payment of the debts, claims, and demands against the defendant company filed and allowed, or which may be proved, with any interest properly payable thereon, and the costs and expenses of such receivership, will be at least Two Hundred Thousand Dollars ($200,000) in excess of the amount necessary to pay such debts, claims and demands, interests, costs and expenses, and the defendant having claimed in open court that such excess payable and distributable to the defendant upon a final accounting by the receivers will equal or exceed Two Hundred and Fifty Thousand Dollars ($250,000), and the receivers having in open court acquiesced in such claim and the defendant having requested that such excess be paid directly to it and that its receipt be
254 accepted to the amount of Two Hundred and Fifty Thousand Dollars ($250,000) in part payment of such purchase price, it is, upon motion of Reed, Gwinn & Deming, Attorneys for defendant, further ordered that said receivers be, and they are hereby, authorized to accept in part payment of said bid and purchase price, over and above the amount necessary to pay said debts, claims, demands, interest, costs, and expenses, the receipt of the defendant duly authorized by its Board of Directors or its executive committee, for the sum of Two Hundred and Fifty Thousand Dollars ($250,000) provided said defendant, the United States Light and Heating Company, shall execute its agreement to said receivers that the said sum of Two Hundred and Fifty Thousand Dollars ($250,000) shall be available for the payment of any obligations against said defendant or said receivers which may have been or may be filed and allowed or otherwise proved herein.

5. It is further ordered that the purchasers, their assignees or nominees, may pay the remainder of the said purchase price by the delivery of claims filed and allowed with due proof of payment thereof and the discharge of the receivers and their said trust from any obligation in respect thereto, which said claims shall be accepted so receipted by the receivers in part payment at the face amount thereof, together with any interest thereon, and the remainder of said purchase price to be payable to said receivers in cash.

6. That the fees of Morris Cohn, Jr., and Adolph Rebadow, counsel to the receivers herein, be fixed at the sum of Six Thousand Eight Hundred Seventy-Five Dollars ($6,875.00) by consent of all parties to cover all legal services rendered by them to this date, and all services to be rendered by them in respect of the distribution of
255 the proceeds of the sale had herein on the 1st day of July 1915 and all services to be performed by them in respect to any refund of mortgage tax, the said amount of Six Thousand Eight Hundred Seventy-Five Dollars ($6,875.00) each to be payable as follows:

$5,000 out of any funds in the receivers' hands available therefor, and

$1,875 out of the proceeds of any refund of mortgage tax they may procure.

But the allowance herein made for counsel fees is not intended to cover any services whatever to be hereafter rendered by such counsel in respect of any suits or actions pending or to be brought by the direction of said receivers, for the benefit of The United States Light and Heating Company, or otherwise, against any promoters, directors, or officers of the defendant, and said receivers are hereby authorized and directed to pay to each said counsel the sums above specified in the manner therein stated.

7. Upon the consummation of the sale to said Stockholders' Protective Committee, their assigns or nominees, the receivers are hereby authorized and directed to pay as promptly as may be the full amount of any and all claims which have been allowed by them, or which have been otherwise proved, together with any interest properly payable thereon, against the defendant, not used in the payment of the purchase price of said bid, out of any moneys in their hands available therefor.

8. The receivers are hereby authorized and empowered to deposit any instruments executed by them pursuant to this order, with the Guaranty Trust Company of New York in escrow for a delivery upon receipt by them in full of said purchase price.

9. That said receivers report their further proceedings
256 hereunder and herein to this Court with all convenient speed.

JOHN R. HAZEL,
*U. S. District Judge.*

The above order and decree is hereby consented to.

BONYNGE & BONYNGE,
*Attorneys for Stockholders' Protective Committee, substituted as Plff.*
REED, GWINN & DEMING,
*Counsel for the Defendant.*
MORRIS COHN, JR., ADOLPH REBADOW,
*Counsel for the Receivers.*
DUDLEY & GRAY,
*Counsel for Intervening Creditors.*

PETITIONER'S-PLAINTIFF'S EXHIBIT P–13

Receiver's Deed

Approved as to Form—John R. Hazel

Dee: James O. Moore, James A. Roberts, J. Allan Smith as Receivers or United States Light and Heating Company by Receivers and United States Light and Heating Company to U. S. Light and Heat Corporation.

This Indenture, Made and executed as of the 1st day of July 1915 by and between James O. Moore, of the City of Buffalo, New York;

James A. Roberts, of the City of New York, and J. Allan Smith, of the City of Niagara Falls, New York, as receivers of the United States Light and Heating Company, duly appointed by the
257 United States District Court for the Western District of New York, and qualified and acting as such (hereinafter called the "Receivers"), parties of the first part, and The United States Light and Heating Company, a corporation duly organized under the laws of the State of Maine (hereinafter called "Grantor"), party of the second part, and U. S. Light and Heat Corporation, a corporation duly organized under the laws of the State of New York, and having its principal place of business at Niagara Falls, New York (hereinafter called "Purchaser"), party of the third part.

Whereas, by an order and decree of the United States District Court for the Western District of New York, made on the 22nd day of July 1914, James O. Moore and James A. Roberts, two of the parties of the first part, were duly appointed receivers of The United States Light and Heating Company, in a suit in equity then pending in said Court, wherein Central Trust Company of New York was plaintiff, and said The United States Light and Heating Company was defendant and thereafter and on the 20th day of February 1915, J. Allan Smith, one of the parties of the first part, was made an additional receiver of said The United States Light and Heating Company, and all of said receivers did duly qualify as such, and have been since the date of their respective appointments acting as such receivers; and

Whereas, on the 2nd day of June 1915, said order and decree was modified by a further order providing that the business of said The United States Light and Heating Company be wound up, and its property and franchises converted into money, and on the same day an order was made by said United States District Court for the Western District of New York, directing the sale at public
258 auction by said receivers, of the premises and property hereinafter described and hereby conveyed as of the first day of July 1915, upon the terms and conditions specified in said order; and

Whereas, a sale of said premises and property was duly had by and under the direction of said receivers on the first day of July 1915, pursuant to notice approved by said Court and duly published in accordance with said order, at which sale the said premises and property were struck down to Walston H. Brown, Crawford Livingston, Albert N. Parlin, Charles R. Dalgleish, and Herbert V. Falk as and constituting a stockholders' protective committee of the said The United States Light and Heating Company, for the sum of One Million One Hundred Dollars ($1,000,100). Said committee being the highest bidder for said premises and property, and said sum being the highest [illegible] bid therefor; and

Whereas, said sale so [illegible]ade was thereafter, by an order of said United States District Co[illegible] made on the 31st day of July 1915, duly confirmed upon the report [illegible]reof by said receivers made and filed therein; and

Whereas, said Stockholders' Protective Committee did thereafter duly assign said bid to purchaser, by assignment hereto attached and made a part hereof, whereby said purchaser did assume all the obligations and liabilities under said bid and the terms of sale as contained in the order of June 2, 1915, directing such sale; and

Whereas, purchaser has made payments in full of its bid upon such sale in the manner and form complying with the order of this Court, and has become entitled to receive a deed of conveyance, bill of sale, assignment, transfer, and other proper instruments for the vesting of said premises and property in said purchaser; and

259 Whereas this instrument of conveyance has been duly approved by The United States District Court for the Western District of New York; and

Whereas Grantor, party of the second part, is required by the terms of said order to join with the Receivers in the execution hereof,

Now, Therefore, in consideration of the premises hereinbefore contained and of the payments made by said Purchaser and the assumption by it of the obligations specified in the terms and conditions of sale contained in said order of the United States District Court of June 2, 1915, the said parties of the first and second part do hereby grant, release, bargain, sell, assign, transfer, and set over unto the party of the third part, its successors and assigns forever, all of the following described premises and property, viz:

All That Tract or Parcel of Land, situate in the City of Niagara Falls, County of Niagara and State of New York, being part of Lot No. Thirty-Four (34) of the Mile Reserve, so called, bounded and described as follows:

(Here follows description of land conveyed, which is omitted)

Including all buildings on the several described parcels of land, and all plant, machinery, fixtures, appliances, tools, and furniture there or elsewhere contained, together with all books, stationery, and, or contract rights in respect of said land and buildings, subject to all exceptions and reservations contained in the deeds of said premises to The United States Light and Heating Company; also

260 all stock of materials on hand, all manufactured and unmanufactured goods, all bills receivable and accounts receivable, stock of other corporations. all trade marks, inventions, letters patent, applications for letters patent, licenses under letters patent, royalties accrued, and all suits, causes of action, and claims for royalties or damages and profits in respect of any of said inventions, letters patent or licenses; also all secret processes, unfilled orders, contracts and contract rights, business, goodwill and property of said The United States Light and Heating Company, and or of James O. Moore, James A. Roberts, and J. Allan Smith, as Receivers of The United States Light and Heating Company, as of the first day of July, 1915, wherever the same may be situate; excluding and excepting from the property so transferred any and all claims and causes of action arising out of the alleged misconduct of promoters, directors, and officers of the said The United States Light and Heating Company, and their

associates and agents, and excluding and excepting also, from the property so transferred, cash in the hands of said Receivers.

To have and to hold the above granted premises and property unto the party of the third part, its successors and assigns forever.

And the said parties of the first and second part do further covenant and agree to and with said party of the third part that they will, upon demand, make and execute such further assurances of title to said premises and property as may be necessary and as may be directed by said United States District Court for the Western District of New York; provided, however, that no obligation in
261 this respect shall survive, so far as relates to said Receivers, their discharge of their trust by such Court. This grant, conveyance, and assignment is subject to all the obligations and indebtedness of said Receivers, parties of the first part, as of the first day of July 1915, and to all the unmatured obligations of the party of the second part arising out of the operations of the plant and business of said party of the second part as a going concern, all of which said obligations and indebtedness of the Receivers, and unmatured obligations of the Grantor, so specified, are hereby assumed by Purchaser, which agrees to pay the same; excepting, however, any unmatured obligations under contracts, leases, or licenses to or with grantor in respect of which said Receivers shall have rejected or disallowed any claims against the grantor filed with said Receivers; and excepting, also, that the Purchaser, its successors, assigns, or nominees may at any time within sixty (60) days from the date of delivery of possession to it or them by said Receivers, elect whether or not to adopt or assume any lease of real estate or license under letters patent included in the premises and property so sold, or which may constitute an incident or appurtenances thereof, and which is susceptible in law of disaffirmance or objection by the Grantor; and the Purchaser, its successors, assigns, or nominees, shall not be held to have accepted or assumed any such lease or license which it or they shall not have elected to accept or assume in the manner specified in the order directing said sale.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals, and the party of the second part
262 has caused this instrument to be subscribed by its President, and its corporate seal to be hereunto affixed the day and year first above written.

[SEAL] JAMES O. MOORE,
[SEAL] JAMES A. ROBERTS,
[SEAL] J. ALLAN SMITH,
[CORPORATE SEAL] *As Receivers of the United States Light and Heating Company.*
THE UNITED STATES LIGHT AND HEATING COMPANY,
By J. ALLAN SMITH, *President.*

Attest:

C. L. LANE,
*Secretary.*

U. S. Rev. Stamp $541. Cancelled.

* * * * * * *

The Stockholders' Protective Committee of the United States Light and Heating Company of Maine hereby assigns its bid for the property of The United States Light and Heating Company of Maine at the Receivers' Sale held July 1st, 1915, at Niagara Falls, New York, to the U. S. Light & Heat Corporation and instructs the Receivers to execute the Deed covering said property direct to said U. S. Light & Heat Corporation.

UNITED STATES LIGHT AND HEATING COMPANY OF MAINE,
STOCKHOLDERS' PROTECTIVE COMMITTEE,
WATSON H. BROWN, *Chairman*,
HERBERT V. FALK, *Secretary*.

Dated: NEW YORK, JULY 16, 1915.

Recorded: August 5, 1915, at 11:13 A. M. in Liber 388 of Deeds at page 250.

THOMAS T. FEELEY,
*Clerk*.

(County Clerk's Ctf. attached.)

263 ABSTRACT OF PETITIONER'S-PLAINTIFF'S EXHIBIT P–14

Being Deed of Trust (Mortgage)

UNITED STATES LIGHT AND HEAT CORPORATION

*to*

GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE

Deed of trust

Dated June 1, 1915

Recorded August 5, 1915

Deed of Trust executed by U. S. Light & Heat Corporation (a New York corporation) to Guaranty Trust Company of New York, as Trustee, to secure an issue of $1,000,000 for value, First Mortgage, Sinking Fund, six percent, twenty-year gold bonds, in denominations of $100, $500, and $1,000, as described in said Deed of Trust. Said Deed of Trust covers all the property described in the deed of conveyance by the Receivers of the United States Light & Heating Company to U. S. Light & Heat Corporation (Petitioner's-Plaintiff's Exhibit P–13), together with certain patents described in said mortgage. This mortgage was recorded in the office of the Clerk of Niagara County, New York, on August 5, 1915, at 11:21 A. M. in Liber 359 of Mortgages, at page 364, et seq.

264 PETITIONER'S-PLAINTIFF'S EXHIBIT P–15 (a)

Pages 2635 and 2636 of Poor's Manual for 1912, insofar as they relate to the United States Lighting and Heating Company.

United States Light & Heating Co.—Incorporated December 4, 1908, under the laws of Maine, to manufacture electric car-lighting equipment and storage batteries. Purchased entire assets of the National Battery Co. (N. Y.), Bliss Electric Car Lighting Co. (Wis.), and United States Light & Heating Co. (N. J.). New plant at Niagara Falls, N. Y., was put in operation in 1911.

Profit for year ended December 31, 1911, $327,859. Deduct: 7 p. c. dividend on preferred stock, $175,000. Surplus for year, $152,859. Total surplus, December 31, 1911, $226,233.

General Balance Sheet, December 31, 1911.—Capital stock, $15,100,150; accounts payable, $53,037; dividends (payable January 22, 1912), $87,500; reserve for taxes and inventory adjustments, etc., $45,755; profit and loss, $226,232; total, $15,512,674. Contra: Property, including patents, etc., $14,659,704; inventories, $435,093; accounts receivable, $213,607; other current assets, $24,235; cash, $180,035; total, $15,512,674.

Capital Stock.—Authorized—preferred (7 p. c. cumulative), $2,500,000; common, $15,000,000; outstanding, preferred, $2,500,000; common, $12,600,150. Shares, $100—changed from $10 in July
265 1911. Dividends payable semiannually, January and July.

Transfer agent, Empire Trust Co., 42 Broadway, New York, N. Y. Registrar, Central Trust Co., New York, N. Y. Annual meeting, 2d Wednesday in December, at Portland, Me. No bonds. Listed on New York Stock Exchange.

Directors.—David W. Pye, W. P. Hawley, C. A. Starbuck, F. P. Frazier, Newman Erb, T. P. Shonts, W. S. Crandell, New York, N. Y. Officers: D. W. Pye, President; C. A. Starbuck, Vice President; W. S. Crandell, Secretary and Treasurer; J. Allan Smith, Vice President and General Manager. General Office, 30 Church Street, New York, N. Y.

PETITIONER'S-PLAINTIFF'S EXHIBIT P–15 (b)

Excerpts from Poor's Manual

Page 1081 of Poor's Manual for 1913 insofar as it relates to the United States Lighting and Heating Company.

United States Light & Heating Co.—Incorporated December 4, 1908, in Maine, to manufacture electric car lighting equipment and storage batteries. Purchased entire assets of the National Battery Co. (N. Y.), Bliss Electric Car Lighting Co. (Wis.), and United States Light & Heating Co. (N. J.). New plant at Niagara Falls, N. Y., was put in operation in 1911. The profits for the year ended December 31, 1911, were $327,859, from which were deducted divi-

dends of 7 p. c. on the preferred stock, $175,000, leaving a surplus for the year of $152,859. Net shipments: February 1913, $370,-
266 352; March 1913, $446,945; April 1913, $447,202. Surplus for the three months ended March 31, 1913, after all charges, was approximately $180,000. Unfilled orders, June 10, 1913, about $7,000,000.

Income Account, year ended June 30, 1912.—Net profits, after deducting manufacturing costs, $648,875. Selling and operating expenses, $290,800. Net earnings, $358,075; other income, $7,950; total, $366,025. Reserve special, $10,129. Balance, $355,896.

## Comparative General Balance Sheet

ASSETS

| | Dec. 31, 1911 | June 30, 1912 |
|---|---|---|
| Property account | $14,659,704 | $14,776,975 |
| Unissued common stock | ---------- | 2,399,850 |
| Inventories | 435,093 | 525,873 |
| Accounts receivable | 213,607 | 375,435 |
| Other current assets | 24,235 | 9,856 |
| Cash | 180,035 | 127,179 |
| Totals | 15,512,674 | 18,215,168 |

LIABILITIES

| | Dec. 31, 1911 | June 30, 1912 |
|---|---|---|
| Capital stock | $15,100,150 | $17,500,000 |
| Accounts and notes payable | 53,037 | 376,371 |
| Dividends payable | 87,500 | ---------- |
| Reserves | 45,755 | 56,199 |
| Profit and loss | 226,232 | [1] 282,598 |
| Totals | 15,512,674 | 18,215,168 |

267 Capital Stock.—Authorized—preferred (7 p. c. cumulative), $2,500,000; common, $15,000,000; outstanding, preferred, $2,-500,000; common, $12,600,150. Shares, $100—changed from $10 in July 1911. Dividends payable semiannually, January and July. Dividends of 7 p. c. per annum has been paid on the preferred since January 1910.

Transfer agent, etc.—Transfer agent, Empire Trust Co., 42 Broadway, New York, N. Y. Registrar of stock, Central Trust Co., New York, N. Y. Annual meeting, second Wednesday in December, at Portland, Me. Directors' meeting, first Tuesday in every month.

Directors.—C. A. Starbuck, chairman of board; J. Allan Smith, W. P. Hawley, F. P. Frazier, Newman Erb, T. P. Shonts, W. T. Crandall, New York, N. Y. Officers: J. Allan Smith, president; F. P. Frazier, W. P. Hawley, vice presidents; W. S. Crandall, secretary and treasurer. Office, 30 Church Street, New York, N. Y.

[1] After deducting dividend paid January 20, 1912, and dividend payable July 22, 1912.

PETITIONER'S-PLAINTIFF'S EXHIBIT P-15 (c)

Pages 2326 and 2327 of Poor's Manual for 1914, insofar as they relate to the United States Lighting and Heating Company.

United States Light & Heating Co.—Incorporated December 4, 1908, in Maine; consolidation of the Bliss Electric Car Lighting Co., of Milwaukee, and the National Battery Co., of Buffalo. Controls United States Light and Heating Co., of New Jersey. Com-
268 pany manufactures electric lighting and heating apparatus in which the generating power is taken from the axles. The manufacture of these apparati is fully protected by patents all over the world. Through its subsidiaries, company owns a patent on a roller-bearing power transmission in which the strain is taken away from the armature bearing. The storage batteries in each car enable the continuous use of light for six days without the wheels moving. This system of car lighting has already been installed on over 50 railroads. Principal plant located at Niagara Falls; all the other plants, except that at Buffalo, N. Y., have been closed.

In April 1912 acquired rights of manufacture and sale of device for electrically lighting and starting automobiles; contracts have been obtained, covering a period of three years, for a large number of devices, and an addition to the company's plant at Niagara Falls, with a capacity of 40,000 starters annually, has been built to handle this business.

Stockholders committee.—Committee consists of John A. Sleicher (chairman), Frederick R. Humpage, and Guy M. Walker.

Proxy committee.—George W. Baxter, Knoxville, Tenn.; Albert N. Parlin, Boston, Mass.; Charles R. Dalgleish and Herbert V. Falk, New York, N. Y.

Receivership.—On application of Frederick R. Humpage, one of the board of managers of the company, Judge Hazel, on July 13, 1914, appointed A. Henry Ackermann, Guy M. Walker, and James O. Moore as receivers for company. Subsequently, on July 17 following, the case was reopened and Moore was appointed sole receiver pending a hearing. On July 22, 1914, Judge Hazel appointed
269 James A. Roberts, of New York City, to serve with James O. Moore, of Buffalo, as receivers for the property.

Comparative Income Account, Years Ended June 30

| | 1912 | 1913 |
|---|---|---|
| Net shipments | $1,835,976 | $3,318,585 |
| Other income | 7,950 | 540 |
| Totals | 1,843,926 | 3,319,125 |
| Manufacturing costs | 1,187,101 | 2,573,161 |
| Selling and Operating expenses | 290,800 | 399,034 |
| Reserve special | 10,130 | ---------- |
| Total deductions | 1,488,031 | 2,972,195 |
| Net earnings | 355,895 | [1]346,930 |
| Preferred dividends | (7)175,000 | (3½)87,500 |
| Balance surplus | 180,895 | 259,430 |

[1] Of the net earnings in 1913, $109,199 represents claim against licensor deductible from its share of future earnings under contract for manufacture of electric starter.

Additional Companies Comparative General Balance Sheet

ASSETS

| | Dec. 31, 1911 | June 30, 1912 | June 30, 1913 |
|---|---|---|---|
| Property account | $14,659,704 | $14,776,975 | $15,125,484 |
| Unissued common stock | | 2,399,850 | 2,399,850 |
| Inventories | 435,093 | 525,873 | 966,976 |
| Accounts receivable | 213,607 | 375,435 | 554,387 |
| Other current assets | 24,235 | 9,856 | 7,182 |
| Cash | 180,035 | 127,179 | 32,107 |
| Totals | 15,512,674 | 18,215,168 | 19,085,986 |

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LIABILITIES

| | Dec. 31, 1911 | June 30, 1912 | June 30, 1913 |
|---|---|---|---|
| Capital stock | $15,100,150 | $17,500,000 | $17,500,000 |
| Accounts and notes pay | 53,037 | 376,371 | 1,028,603 |
| Dividends payable | 87,500 | | |
| Reserves | 45,755 | 56,199 | 15,356 |
| Profit and loss | 226,232 | *282,598 | 542,028 |
| Totals | 15,512,674 | 18,215,168 | 19,085,986 |

* After deducting dividend paid January 20, 1912, and dividend payable July 22, 1912.

Capital Stock.—Authorized—preferred (7 p. c. cumulative), $2,500,000; common, $15,000,000; outstanding, preferred, $2,500,000; common, $12,600,150. Shares, $100—changed from $10 in July 1911. Dividends payable semiannually, January and July. Dividends of 7 p. c. per annum were paid on the preferred from January 1910 to January 31, 1913, inclusive; dividend due July 1913 omitted on account of extension to factory.

Transfer Agent, etc.—Transfer agent, Empire Trust Co., 42 Broadway, New York, N. Y. Registrar of stock, Central Trust Co., New York, N. Y. Annual meeting, second Wednesday in December, at Portland, Me. Directors' meeting, first Tuesday in every month.

Bonds Authorized.—Shareholders at meeting held April 9, 1914, ratified the plan to issue $1,500,000, 15-year 6 p. c. first mortgage serial bonds, part of proceeds to be used to meet the $610,000 short term notes which matured July 1, 1914. No description available.

Directors.—C. A. Starbuck, Chairman of Board; J. Allan Smith, W. P. Hawley, F. P. Frazier, Newman Erb, T. P. Shonts, W. T. Crandall, New York, N. Y. Receivers: A. Henry Ackermann,
271 Guy M. Walker, and James O. Moore. Officers: J. Allan Smith, President; F. P. Frazier, W. P. Hawley, Vice Presidents; W. S. Crandall, Secretary and Treasurer. Office: Niagara Falls, N. Y.

DEFENDANT'S EXHIBIT G–1

Before the Commissioner of Internal Revenue, Washington, D. C.

IN THE MATTER OF THE SAFETY CAR HEATING & LIGHTING COMPANY

Alleged additional Federal Income Tax for the Years 1925 and 1926.

PROTEST

Filed Nov. 14, 1928

Symbols IT:AR:D:HL

The Safety Car Heating and Lighting Company (hereinafter described as the "Taxpayer"), a corporation of the State of New Jersey, whose principal office in New Jersey is at No. 21 South Day Street, Orange, New Jersey, and which has a plant at New Haven, Connecticut, and its executive offices at No. 75 West Street, New York City, has received a letter from the Commissioner of Internal
272 Revenue claiming additional income tax for the years 1925 and 1926, as follows:

| | |
|---|---|
| For the year 1925 | $22,971.40 |
| For the year 1926 | 24.40 |
| | 22,995.80 |

Said letter is dated September 28, 1928, and states that the recommendations of the Revenue Agent in this case have been approved, consideration of the protest filed with the Agent in connection therewith, and if the Taxpayer does not acquiesce in the changes it will be afforded an opportunity for a hearing before the Income Tax Unit at Washington upon request.

The Taxpayer on October 11, 1928, wrote to the Commissioner acknowledging his letter of September 28, 1928, stating that it did not acquiesce in the report of the Revenue Agent or in the approval of the same by the Commissioner, and requested a hearing before the Income Tax Unit.

The Taxpayer received a letter from the Commissioner dated November 3, 1928, granting the Taxpayer ten days from that date to submit a protest.

No hearing was had in this case by the Revenue Agent after he submitted his report to the Taxpayer.

The Taxpayer protests the reports of the Revenue Agent and the Commissioner, and submits the following:

POINT I

The Taxpayer Protests Against the Inclusion of $176,531.95 as Additional Income for the Year 1925.

The Taxpayer for many years has been engaged in the manu-
273 facture and sale of electric-lighting equipment for illuminating railway passenger cars wherein the electric current is generated by means of a dynamo under the car and operated by a belt from the axle. The Taxpayer was a pioneer in the development of this system and commenced its developments in 1907 or 1908. Prior to 1913 it was the owner of United States Letters Patent No. 747686. This Patent is unique. It is the one outstanding patent in the entire train-lighting art. It is not for a generator or for a lamp regulator or for a storage battery or for a switch, but is for a Train-Lighting System which includes all these devices and, in addition, an indispensable instrumentality for protecting the storage battery. Understanding that the storage battery is one of the most costly factors in the system and the one most liable to injury, anything which can be depended upon to permit safe battery operation is of the utmost importance.

So great was the need for such a device that the railroads would not purchase a system without it. It is a system in which the generator output may be maintained constant in spite of varying train speeds—a condition opposed to the natural conditions, because the faster a generator is driven the higher will normally be the voltage generated. Not only this (which means uniform light in the railway cars) but the change in the battery condition as it becomes fully charged, or approaches full charge, is made to react on the generator to stop the charging operation or taper down the charging, so as to prevent damage to the cells.

For example: If the normal charging current for the battery by 20 amperes, this system will supply 20 amperes to the battery irrespective of speed. But it also provides that when the battery be-
274 comes charged the generator will automatically stop charging. Or, should it be desired, the system may be adjusted to taper down the charging current gradually so that at full charged condition the flow of charging current will have ceased.

The United States Light and Heating Company (hereinafter described as the United States Company) a Maine corporation, having its plant at Niagara Falls, New York, was an active competitor of the Taxpayer in the axle lighting business. After careful investigation in 1911 and 1912 the Taxpayer found that this company was systematically using Patent No. 747686, to the great damage of the Taxpayer and making large profits which belonged to the Taxpayer. In 1912, the Taxpayer instituted a suit against the United States Company in the District Court of the United States for the Western District of New York, to enjoin the United States Company from using Patent No. 747686, and demanding damages for its use and an accounting of the profits made by the United States Company. After a trial of the issues a decree was entered February 15, 1915,

in favor of the Taxpayer enjoining the United States Company from using said patent. This case is reported in 222 Fed. Rep. 310. This decree was affirmed by the Circuit Court of Appeals, Second Circuit, in July 1915, and is reported in 223 Fed. Rep. 1,023.

The decree of February 15, 1915, referred the case to a Special Master to take testimony and report to the Court the amount of damages suffered by the Taxpayer and profits made by the United States Company by the use of said patent and for which it was accountable to the Taxpayer.

The Special Master filed his report in 1918, finding that the United States Company made profits by the use of said patent—by having sold in the period from January 1, 1909, to April 30, 1914, over
275 5,000 axle light equipments with the device covered by the Taxpayer's patent, and further found that the profits from the sales amounted to $50[illegible] 180.32 and directed that the United States Company pay this sum to the plaintiff. The report of the Master as to the profits made by the United States Company and due the taxpayer covered various periods of time. For convenience, the same is shown in two schedules: (a) covering profits prior to March 1, 1913, and (b) covering profits subsequent to March 1, 1913, viz:

| (a) Period: | *Profits reported by Master* |
|---|---|
| 18 mos.—Jan. 1, 1909, to June 30, 1910 | $33, 101. 20 |
| 12 mos.—July 1, 1910, to June 30, 1911 | 147, 505. 53 |
| 12 mos.—July 1, 1911, to June 30, 1912 | 171, 608. 73 |
| 9 mos.—July 1, 1912, to Feb. 28, 1913 | 83, 921. 95 |
| | 436, 137. 41 |

| (b) Period: | *Profits reported by Master* |
|---|---|
| 3 mos.—Mar. 1, 1913, to June 30, 1913 | $41, 960. 35 |
| 10 mos.—July 1, 1913, to Apr. 30, 1914 | 23, 082. 56 |
| | 65, 042. 91 |

| | |
|---|---|
| Total profits prior to Mar. 1, 1913 | 436, 137. 41 |
| Total profits subsequent to Mar. 1, 1913 | 65, 042. 91 |

Exceptions to the report were heard and on October
276 3, 1923, the Court overruled the exceptions and affirmed the report, and on October 5, 1924, judgment was entered in favor of the Taxpayer and against the United States Company for the amount reported by the Master.

Further proceedings were taken to enforce said judgment against the U. S. L. Corporation (a New York Corporation), the successor to the United States Company, by reason of a stockholders' reorganization, and these proceedings are reported in 2 Fed. Rep. (Second) 283. The details of these proceedings are not now essential to the consideration of this case.

After long negotiations and taking into account the condition of the U. S. L. Corporation (the successor to the United States Company),

the Taxpayer consented to a compromise of the judgment for $200,000. This sum being paid in May 1925.

The expenses in connection with this matter amounted to $23,641.65, leaving a net amount of $176,531.95, which the Revenue Agent has included as taxable income for the year 1925. The sum of $176,531.95 is 35.2232195% of the judgment of $501,180.32. Applying this percentage to the profits for the period prior to March 1, 1913, and those subsequent thereto gives the following result:

| | |
|---|---|
| Profits prior to March 1, 1913 | $153,621.72 |
| Profits subsequent to March 1, 1913 | 22,910.23 |

There is submitted herewith an affidavit of Edwin W. Hammer, an engineer who was retained by the Taxpayer in June 1912 in the suit against the United States Company, stating that in his opinion the claim of the taxpayer against the United States Company was on March 1st, 1913, worth upwards of $690,000.00.

277 The award of the Master for profits and damages up to March 1st, 1913, was $436,137.41 on which the Taxpayer received $153,621.72. The valuation of Mr. Hammer of this claim on March 1st, 1913, being in excess of either of the foregoing items, the taxpayer contends that the sum of $153,621.72 representing profits prior to March 1st, 1913, is not taxable no matter when it was collected because on March 1st, 1913, it was capital and when the Taxpayer collected the same it is only a realization of capital.

## Point II

Taxpayer Protests Against the Calculation Made as to the Payment of the Canadian Taxes.

The Canadian income taxes for the years in question were paid by the Company by checks drawn on banks in Montreal, Quebec, and, of course, the funds on deposit in these banks were carried on the books of the Taxpayer at par. The Revenue Agent cites I. T. 2255 and I. T. 2336 as the basis for his calculations. These decisions simply establish the rate of exchange of various foreign countries which would be accepted by the Bureau as the current market rates of exchange prevailing on December 31st, 1925 (I. T. 2255) and December 31, 1926 (I. T. 2336). The correct method of establishing the exchange is in accordance with S. M. 4801 (C. B. December 25, 1925, page 201), which holds that the amount of the Canadian dollars should be reduced to American money when claiming a credit therefor, and if the accrued taxes when paid differ from amounts claimed as credits, the Commissioner shall re-determine the amount of tax due and the additional tax shall be paid and the other payment

278 refunded, as the case may be. The 1925 taxes were paid by checks drawn on the Montreal Bank on April 19, 1926; the 1926 taxes were paid by checks drawn on the Montreal Bank on April

21, 1927. These taxes were treated as a payment at par. According to the Revenue Agent's calculations, this credit for 1925 is reduced $22.25 and for 1926, $24.40, a total of $46.65. Technically, if S. M. 4801 is followed the rate of exchange should be calculated as of the date the accrued taxes were actually paid as stated herein. The Taxpayer is of the opinion that having carried its money on deposit in the Montreal Bank at par and having accounted in its income-tax returns for all of its income from Canada at par, irrespective of the rate of exchange, and having paid its tax in Canadian dollars at par, it is unfair to apply the rate of exchange as of December 31st, in each year, to the payment of said tax and thus reduce the credit which the Taxpayer is entitled to herein.

CONCLUSION

After the receipt of the report of the Revenue Agent, dated July 31, 1928, a protest was submitted to him under date of August 17th, 1928, and a request for a hearing was made. The Revenue Agent declined to grant this hearing, and said he would send all the papers to Washington calling the attention of the Commissioner to the conclusion in the protest submitted to him that the taxpayer requested a hearing before the Commissioner on the points raised in the protest before Revenue Agent.

Respectfully submitted.

THE SAFETY CAR HEATING & LIGHTING COMPANY,
*Taxpayer.*

By HENRY T. STETSON, *Its Attorney.*

279 STATE OF NEW YORK,
*County of New York, ss:*

HENRY T. STETSON, being duly sworn, deposes and says: I am a counsellor at law of the State of New York and General Attorney for the Safety Car Heating and Lighting Company, the within-named taxpayer; I prepared the foregoing protest on behalf of the said taxpayer, and the facts contained therein are true to the best of my knowledge and belief and are taken from the records of the company and records of the suit described in Point I.

HENRY T. STETSON.

Sworn to before me this 12th day of November, 1928.

LOUISE KUHNER,
*Notary Public Queens Co., Clerk's No. 1098.*

Certificates filed: Queens Co. Reg. No. 804, N. Y. Co. Clerk's No. 158, Reg. No. 0–152, Kings Co. Clerk's No. 181, Register No. 338.
Commission expires March 30, 1930.

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TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
*Washington, D. C.*

IN THE MATTER OF THE SAFETY CAR HEATING & LIGHTING COMPANY AND AFFILIATED COMPANIES;

Examination of returns for the year 1925

Symbols: IT: AR: D: HL

AFFIDAVIT OF EDWIN W. HAMMER

STATE OF NEW YORK,
*County of New York, ss:*

EDWIN W. HAMMER, being duly sworn, deposes as follows:

I am a consulting engineer (New York State License No. 7170), with offices at 80 John Street, New York City. The Safety Car Heating & Lighting Company has been one of my clients for more than sixteen years.

I am a Fellow of the American Institute of Electrical Engineers, a Member of the American Society of Mechanical engineers and the New York Patent Law Association, and am connected with other learned bodies. My professional experience dates from 1884, when I became connected with Edison interests. I have been a pub-

281 lic utilities manager and engineer and have been connected with engineering departments of large corporations. I am accustomed to the consideration of questions involving valuations of properties, and am especially familiar with patents, patent litigations, patent infringements, and recoveries of profits and damages in patent suits.

For the fifteen years extending from 1896 to 1911 I was engineer for the Board of Patent Control of the General Electric Company and Westinghouse Electric & Manufacturing Company, and in that capacity had before me for consideration many patent questions of large moment. Since 1911 I have been connected in a consulting and expert capacity for many important clients in connection with their patent litigation and other matters.

I am now asked by the Safety Company to state whether, and if so, why, an item of $200,000 received in 1925 from the United States Light & Heating Company in settlement of a patent litigation, was, in my opinion, properly Capital and therefore not subject to tax. In striving to answer these questions it must be understood that no legal opinion is attempted, for I am not a lawyer, but merely such a judgment as a business man or engineer can make, particularly if he is well acquainted with United States patents and considerations affecting them. I was the technical advisor and witness for the Safety Company in the suit against the United States Light & Heat-

ing Company in which the above recovery of $200,000 was made, from my retainer on June 15, 1912 (shortly after the suit was brought), until the Decree was handed down by the U. S. Circuit Court of Appeals on July 14, 1915, and the Master's report was filed on December 18, 1922.

282 The suit was on Creveling patent, No. 747686. This patent is unique. It is the one outstanding patent in the train-lighting art. It is not for an axle-driven electric generator or for a lamp regulator or for a storage battery or for an automatic switch, but is for a Train-Lighting System which includes all these devices and, in addition, an indispensable instrumentality for protecting the storage battery. Understanding that the storage battery is one of the most costly factors in the system, both in first cost and in maintenance, and the one most liable to injury, anything which can be depended upon to give safe battery operation is of the utmost importance. The Creveling System was the first to protect the battery and generator while both were connected to the car lights.

So great is the need for such a device that the railroads will not purchase a system without it. In this suit testimony to that effect was given by railroad and Pullman officials. It is a system in which the generator output may be maintained constant in spite of the varying train speeds—a condition opposed to the natural tendencies, because the faster a generator is driven by the car axle the higher will normally be the voltage generated. Not only this (with maintenance of uniform candlepower in the car lights) but the change in the battery condition as it becomes fully charged, or approaches full charge, is made to automatically react on the generator to stop the charging operation or taper down the charging current, so as to prevent damage to the cells or to the generator itself.

For example: If the normal charging current for the battery be, say, 20 amperes, this system will supply 20 amperes to the battery irrespective of train speed. But it also provides that when the battery becomes charged the generator will automatically stop charging, while still furnishing current needed for the lights on the car. Or, should it be desired, the system may be adjusted

283 to taper down the charging current gradually so that when fully charged the flow of charging current will have ceased.

A few words about patents in general may serve as a useful background against which my further statements may stand: A United States patent is the tangible evidence that a contract has been entered into between the People (through their Government) and an inventor, under which the latter is given the sole right to make, use, and sell his invention. In other words, he is given a monopoly which no one may invade. The consideration is that the inventor describes publicly how his invention may be practiced; the condition is that the public shall have the right to freely use the invention after the lapse of seventeen years. So here is a domain within which, for seventeen years, there must be no trespass. The grant of the

patent confers this monopoly. The patentee does not have to prove it. The patentee does not have to demonstrate its validity. It is valid until proved otherwise. As an illustration of this fundamental truth it may be pointed out that the Federal Courts frequently hold "inquests" in patent suits; the plaintiff offers the patent, proves his ownership or right to sue, states the nature of the infringement of his "rights", and rests his case; if the defendant fails to produce competent proofs, an injunction issues, because the patent is prima facie valid.

These facts may be useful here, because the Creveling patent was valid when issued, it was valid when the suit was brought under it against the United States Light & Heating Company, it was valid when Judge Hazel handed down the decision of the District Court, it was valid when the Circuit Court of Appeals affirmed Judge Hazel,
and it was valid until it expired seventeen years from its date
284 of issue. It was not something Creveling or the Safety Company had to prove, and it was something the infringer did not and could not disprove.

It goes without question, I assume, that the "sole right to make, use, and sell" is not an inchoate right, an intangible right, a right which must be proven. The fact is that it is a very real right, which may be parted with by assignment in whole or in part. A patent owner sometimes sells the right to sell, or the right to use (either solely or jointly with others), or the right to manufacture, or all or parts of these. He frequently sells a patent with the reservation of right to collect for profits or damages by some or all infringers up to a date stated. These rights are worth money and command money. How much money may have to be proven, but the right to collect is a very real one, as many an infringer of patents has found to his sorrow, if not his surprise.

Therefore my view is that if the United States Light & Heating Company made a profit of $200,000 or more through its infringement of the Creveling patent prior to March 1, 1913, and the Safety Company suffered damages by reason of such infringement, these profits and damages were as much the property of the Safety Company then, and properly convertible to Capital, as when the recoverable amount was formally placed in its treasury under order of court.

It will be understood that profits and damages are two distinct features in the calculation of what a patent owner may have been deprived of by reason of an infringement. The profits made by the infringer may be said to represent the excess of selling price over the cost of production; damages may be said to represent a loss imposed upon the injured party through the action by the wrongdoer,
who may or may not have realized a direct pecuniary benefit
285 through which the patent owner has been injured. Thus the wrongdoer may make a direct profit out of his wrongdoing, while at the same time preventing the injured party from making

profits or securing other advantages which would naturally have come to him if the wrongful act had not been committed. The measure of recovery for damages is not what the wrongdoer has gained but what the patent owner has lost.

My general feeling has always been that the condition before us is comparable to the theft of ore from a mine. The theft is discovered and what has been stolen is recognized as belonging to the mine-owner. But how much was stolen? When the amount is ascertained and accounted for, is the mine-owner any richer than before the theft? Not a thing has been added to his wealth; that ore belonged to him all the time; the only thing was—a certain amount had been temporarily removed from his control.

The matter is so clear to me that I dislike to make the application to this Creveling situation and only do so to put myself squarely on record: The Safety Company's "mine" was its Creveling patent; its "ore" was the monopolies the Company was guaranteed by the Government under the patent; the "theft" was the infringement; the "recovery" was what the United States Company paid in set'lement of its invasion of the Safety Company's rights. But the Safety Company was no richer than it was originally (that is, prior to March 1, 1913). As a matter of fact it was poorer, because it took what it could get in settlement, which was less than what had been taken from the "mine" prior to March 1, 1913.

When I was retained by the Safety Company, in June 1912, I found that my client was greatly concerned over the invasion of what it properly considered its peculiar field of electric railway
286 car-lighting by the United States Light & Heating Company. One of its important officers had been enticed from its employ and, apparently by reason of his connections and peculiar knowledge of Safety Company ideals, methods, apparatus, costs, and selling policy, the United States Company had adopted and was exploiting the Creveling System. This competitor had secured substantially all of the Pullman business and was known to have sold about three equipments for every single one the Safety Company had sold. This meant that the infringer had, by the middle of 1912, sold in the neighborhood of 4,000 equipments, the precise number not being actually known to us.

By Pullman business I mean the sale of car-lighting equipments to the Pullman Company, the greatest single user of such devices by reason of the large number of Pullman sleeping cars, chair cars, and dining cars to be found on the railroads of the country.

Moreover, we knew that our competitor had not been faced with patent and development expense or the expense of educating the railroad public of the need, convenience, and economy of this system of electric car-lighting. It had deliberately taken the fruit of Safety Company enterprise to beat it in its own field. And it was succeeding so well in the effort that the Safety Company was properly alarmed; litigation to put a stop to this condition was imperative.

These and other facts were made known to me as soon as I began my study of the patent situation for the Safety Company, and I knew, many months prior to March 1, 1913, that the United States Company was damaging the Safety Company and depriving it of profits which actually belonged to it.

I can and will show how much this amounted to, for I
287 have figures which would enable me to compute this with considerable accuracy.

The Safety Company profits were at least $110 per equipment, and the infringer would make at least that direct profit on those equipments it sold; on the basis of 4,000 equipments this would amount to $440,000. In addition, this unwarranted invasion of the Safety Company's field of monopoly was holding down the selling price of equipments which should have been $25 or more per equipment greater. This was a matter of damage aggregating $100,000 more. Still another and a most important element of damage lay in the profits on replacement and repair parts, of which the Safety Company was deprived by reason of the fact that it had been prevented from selling 4,000 original equipments, the component parts of which were subject to wear, breakage, etc. My experience, observation, and information are to the effect that $15 profit per equipment per year on repair parts is a very conservative figure; at the rate of 1,000 equipments sold per year by the infringer for four years, this would amount to $150,000. In other words, the first year's 1,000 equipments would be subject to wear for four years and this would be accompanied by repairs involving profits of $15 per year per equipment, aggregating $60,000; the second year's 1,000 equipments would be subject to wear for three years, the third year's 1,000 equipments for two years, and the last year's 1,000 equipments for one year, with repair profits of $45,000, $30,000, and $15,000, respectively; the sum of these four items being $150,000.

From the above it is evident that prior to March 1, 1913, there was available to me information which, on the basis of 4,000 equipments sold by the United States Light & Heating Company, showed
88 that such concern had invaded the Safety Company domain of monopoly at least to the extent shown in the following table:

| | |
|---|---|
| Direct profit on 4,000 equipments at the rate of $110 per equipment | $440,000 |
| Profit of which Safety Company was deprived owing to abnormally low prices due to the unwarranted competition (4,000 x 25) | 100,000 |
| Deprivation of profits on replacements and repair parts on equipments Safety Company did not sell ($15 per year per equipment on 1,000 equipments per year sold for four years as calculated above) | 150,000 |
| Total | 690,000 |

This sum represents a statement of the conditions as of March 1, 1913, and does not include any items of a period subsequent to such date. It is not a statement of the value of the patent, but a statement of the amount of property of the Safety Company which had been unlawfully taken from it prior to the date mentioned, and which it was entitled to recover.

The infringement of the Creveling patent by the United States Light & Heating Company was a certainty. I mean that from the time I came into the case (1912), I realized that unless the defendant could prove that some other inventor had "anticipated" Creveling, there was no doubt of a recovery, as defendant's system was the Creveling system. There was no such proof, so the inherent validity of the patent was not disturbed. It is unnecessary to quote the statements of the courts, as the decisions are readily available.

289 It is, therefore, apparent that by March 1, 1913, the domain of monopoly belonging to the Safety Company had been invaded (by the fact of infringement); that the Safety Company had been deprived up to that time of $690,000 belonging to it; that this $690,000 represented direct profits made by the infringer of $440,000 and direct damages to the Safety Company of $250,000; that these figures are extremely conservative and represent a material understatement.

From the statements herein, I am clearly of the opinion that any person with knowledge of the facts I have enumerated might, on March 1, 1913, have reasonably expected to recover from the United States Light & Heating Company by reason of its infringement of patent No. 747,686, at least the sum of $690,000.

EDWIN W. HAMMER.

Subscribed and sworn to before me this 12th day of November 1928.

LOUISE KUHNER,
*Notary Public Queens Co., Clerk's No. 1098.*

Certificate filed; Queens Co. Reg. No. 804, N. Y. Co. Clerk's No. 158, Reg. No. 0–152, Kings Co. Clerk's No. 181, Register No. 338. Commission expires March 30, 1930.

290 DEFENDANT'S EXHIBIT G–2

IT:T:CR:JCA—11757498.

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
*Washington, D. C.*

IN THE MATTER OF THE SAFETY CAR HEATING & LIGHTING COMPANY AND AFFILIATED COMPANIES

Examination of returns for the years 1914 to 1918, inclusive

SUPPLEMENTAL AFFIDAVIT OF EDWIN W. HAMMER

Filed about March 1, 1924

STATE OF NEW YORK,
*County of New York, ss:*

EDWIN W. HAMMER, being duly sworn, deposes as follows:

On December 10, 1920, I made affidavit in this cause as to what was, in my opinion, the fair value of the 336 patents belonging to

the Safety Car Heating & Lighting Company, on March 1, 1913. I am informed that no action has been taken by the Department, based upon such appraisal. I really do not wonder—it was certainly a dry statement, filled, as it was, with technical details about
291 complicated apparatuses which would necessarily mean little to any but specialists in these scientific fields.

It is not surprising, therefore, that my valuation of $2,304,075 has not yet been accepted as positive proof. I am persuaded, however, that if I had rigidly applied the same formula to the entire list, the result would have been a total much higher than the figures actually submitted. In other words, I considered each patent on its individual merits, in the light of facts known to me, and resolved all uncertainties in favor of a low valuation.

When all is said and done, any valuation of a patent is a matter of opinion, and I presume the real question in a matter of this sort is for those in authority to decide as to whose opinion is probably best informed.

Under the circumstances I have been requested to enlarge somewhat upon my previous affidavit to make more plain why my figures reached the aggregate I there reported, and this I will attempt to do. If the statement appears somewhat informal, I hope this will be overlooked in the light of the facts presented.

(1) A patent is a curious grant of Government. It is a two-sided contract. It does not give the patentee the right to make, use, and sell his invention, because that is his inherent right, provided he does not invade (infringe) the rights of others. The inventor is under no obligation, natural or statutory, to disclose his invention to others; he may keep it locked up in his safe for his personal gratification, if he is so minded. If it becomes known, however, the public has the right to use it without cost. But under our laws, enacted under the constitutional permission to foster the useful arts in this manner, the Government says, in effect: "If the inventor will disclose to the public the details of his invention and how it
292 may be practiced, the Government will, in return, give him the *exclusive* right to make, use, and sell the invention for seventeen years, after which the public is to have the free use of the invention forever." The resulting grant is a "patent" for the invention. Such patent contains not only a description of the invention, often accompanied by drawings, but must also contain one or more definitions of what the invention consists, which are the "claims" of the patent—what the patentee *claims* as his *invention*; the claims are the measure of the invention and indicate the scope of the monopoly granted. So when the infringement of a patent is spoken of, we mean that someone is doing something which is covered by one or more of the claims of that patent. The claims are therefore important parts of a patent and may well limit, in many cases, the value of that patent.

(2) If, in spite of the grant of a patent, someone else uses the invention, the owner of the patent may sue in a United States Court

the alleged infringer. As a result of such litigation the Courts may find the patent valid or invalid, and infringed or not infringed; if found to be invalid, the usual reasons are "anticipation" (where someone has previously made the same invention) and "lack of invention" (where the Court feels that it did not require the exercise of "invention" to evolve the subject-matter of the patent, but only the expected skill of those proficient in the calling). When a patent is found by the Courts to be valid and infringed, the owner of the patent is entitled to recover his costs and also profits (earned on the invention by the infringer) and damages (suffered by the owner as the result of the infringement). These are all circumstances to be considered in arriving at a valuation of patents.

(3) It frequently happens that important patents are so
293 obviously valid that no one ventures to infringe upon them. This is what is known as "public acquiescence" and is often of the greatest import in arriving at patent values.

Other considerations which may be noted are:

(4) Whether the patent is "ahead of its time"—in other words, whether the invention was made before industry was ready for it.

(5) Whether the patent rested in strong hands—that is, whether the owners were or were not in a position to properly exploit it.

(6) Whether the invention has gone into use; and, if so, to what extent and at what profit.

(7) Whether the patent covers the fundamental apparatus or method or one of several ways of accomplishing a result; and, if there is more than one way, whether the same owner controls them all.

(8) Whether there are other people in the field ready and able to market a construction capable of accomplishing the same result without infringing.

(9) Whether the invention may be used without infringing upon the rights of others.

(10) Whether the invention has an "insurance" or "nuisance" value.

(11) Whether the business of the patent owner is based wholly or largely upon such ownership.

In explanation of these points (4) to (11) a few words may be useful: For example, some seventy-five years ago a blacksmith devised an electric railway and built a working model; but nothing came of it because there was no dynamo to supply current to it and no suitable motor to give the motive power; therefore the invention was "ahead of its time."

294 A certain inventor secured a patent several years ago which he did not have the money or knowledge or position to commercialize; it was dead on his hands until a corporation's activities warranted a purchase for $550, which was $550 more than the inventor had hoped to receive from his ownership; the new owners will spend money on the commercial development of the apparatus and will find a market for it; the patent is worth more than $550 in the new hands.

The above patent would have remained worthless if it had remained in weak hands but became valuable in strong; how valuable will depend, of course, upon what the new owners do with it, how much business they do under it, and how much profit can be made as a result of their ownership of it.

It can readily be understood that if such a patent covers the only known way of doing a very useful thing, it will be more valuable than if it covers only one of several equally good ways of doing it; also, that if the present owners also owned patents on the other ways of doing it, their position was materially strengthened by their ownership of this patent; and also, if the arrangement of this patent was preferable to any other known arrangement, patented or unpatented, their ownership put them in a strong competitive position.

However, if their competitors were able to market a construction equally satisfactory without infringing this patent, its ownership would be less valuable than if it dominated that particular part of industry.

On the other hand, it may be that the present owners realize a possible competitor might be inconvenienced by their ownership of the patent, in which event the patent possesses a value based on the fact that the competitor cannot get it—in other words, an "insurance" or "nuisance" value; or, the owners may wish to fortify
295 themselves for future use of the invention, even if not to be used at once.

And, of course, if a business could be successfully established because of the ownership of this patent—an impossibility with the patent outstanding against it—the value of such patent would be greatly enhanced.

The immediate importance of the above statements and examples is apparent when the principles involved are applied to the business of the Safety Car Heating & Lighting Company. In order to make the application effective, some of the facts relating to the history of the company should be kept in mind, and I am therefore taking the liberty of recording something relative to one of the great romances of industry. My desire is that the reader of these pages may acquire something of the atmosphere in which the company has achieved its success, which I have learned to appreciate as the result of years of association with its patent affairs.

If the facts I present be carefully considered in connection with the tabulation of "factors" recited above, and their application is then made to the Safety Company patents I appraised three years ago, I am sure the result will be a recognition that the $2,304,075 of my appraisal represented a very conservative valuation of the 336 patents involved.

The fundamental fact is that the Safey Company's business is—and has been from the beginning—founded upon its ownership of patents. Its history is a striking example of the beneficent results following the constitutional fostering of industrial progress through our patent system. A very tangible conception of what such patent

ownership has meant is to be secured from the fact that this ownership has permitted the distribution to stockholders of
296 $17,800,000 in dividends and the accumulation of an undivided surplus of some $4,500,000 more.

A disastrous railroad accident in the early 80's at Ashtabula, Ohio, in which cars were burned and many lives were lost, seems to have stimulated numerous inventors to devise means for more safely heating trains than by coal-burning stoves as then used in each car. The improvements consisted generally in the utilization of steam from the locomotive for heating purposes. But when there was no locomotive attached to the trains the cars would get cold so that the locomotive steam was supplemented by a coal or oil heater installed in the car to keep up circulation until locomotive steam was available, when the fire in the heater was discontinued. The conflicting claims of various inventors resulted in "interference" proceedings in the Patent Office, the result of which was that a basic patent was issued to Henry R. Towne (of the firm of Yale & Towne, hardware manufacturers).

An important railroad man from the West—Col. A. W. Soper—became interested in this situation and was responsible for the formation, in 1887, of the Safety Car Heating & Lighting Company, with a capitalization of $1,000,000. Of this amount, $600,000 in cash and stock was paid Mr. Towne and others for the patents which applied to the "safety" car-heating scheme. Mr. Towne was the first president and was succeeded by Col. Soper. In 1912 a consolidation with other car-heating interests was effected through the formation of the Standard Heat & Ventilation Company, with a capitalization of $2,000,000 ($600,000 preferred and $1,400,000 common). On September 11, 1912, the transfer of the Safety Company's heating patents to the Standard Company was authorized, the
297 contribution being: patents $900,000, and cash and inventories $100,000, for which the Safety Company received Standard Company preferred stock, $300,000, and common stock, $700,000—or half the Standard Company capitalization. In 1917 there was a further consolidation of heating interests through the merger of the Standard Company into the Vapor Car Heating Company. The Safety Company became a one-third owner of the Vapor Company, exchanging its Standard stock for $300,000 preferred and $700,000 common of the Vapor Company. The Vapor Company is the manufacturer of the heating equipments on most of the railway cars of the country today. The Safety Company makes a very comfortable income by reason of its early enterprise and initiative in acquiring and exploiting car-heating patents.

At first the Safety Company did nothing in car lighting, although the word "Lighting" was part of its corporate name and car lighting was within its corporate powers. But by 1889 the Pintsch Light Company of New Jersey, and the Pintsch Light Company of Canada had established themselves under the original Pintsch

patents to supply Pintsch illuminating gas for the lighting of railroad trains, to take the place of the old kerosene lamps. These two Pintsch companies were purchased at that time by the Safety Company, and were then merged into the Pintsch Compressing Company, all of whose stock it still owns. It has a capitalization of $500,000 and a book value of about $5,000,000; it owns plants, buildings, and equipment worth $2,500,000. With the two Pintsch companies the Safety Company acquired the services of Mr. R. M. Dixon, now deceased, but long the president of the Safety Company, and an inventor and patentee of great importance; his patents relating to the gas-lighting of railway cars are among the
298 most valuable of those appearing in my appraisal lists. Mr. Dixon's brother, Mr. J. A. Dixon, came to the Safety Company as an engineer and is now one of its vice-presidents. The Pintsch Compressing Company is licensed under Safety Company patents, but the manufacture and sale of lighting fixtures, gas mantles, and other details is carried on by the Safety Company. The importance of the Pintsch business may be appreciated when it is understood that substantially every gas-lighted railway car on this continent is supplied with Pintsch Compressing Company gas burned in Safety Company fixtures equipped with Safety Company mantles. The Pintsch Compressing Company gross income for 1922 was $2,600,000 and its net income $753,000.

About the beginning of the present century it became evident to many that electricity offered an attractive medium for the lighting of railway cars and trains. Many inventors applied themselves to the production of satisfactory schemes. Some proposed the use of storage batteries alone as sources of current, the batteries to be recharged at railway terminals. Others proposed lighting an entire train from a steam-driven dynamo carried in the baggage car. Still others proposed to make each car carry its own power plant, consisting of a generator mounted on the car-truck and arranged with its shaft parallel to the car-axle and driven by belt from the axle. But with such an arrangement the dynamos only generated current when the train was in motion and this required a storage battery to supply current when the train stood still; the dynamo generated a higher voltage when the train moved rapidly than when it moved more slowly, and this required some form of dynamo regulation; the lamp voltage varied as the number of lamps burning was
299 varied, and this required some form of lamp regulator; the driving belt for the dynamo would stretch with use, and slip, and this required some special form of dynamo suspension.

The Safety Company felt the necessity for fitting itself to enter the electric field of lighting cars and employed inventors and engineers to develop a satisfactory system and apparatus and maintained a laboratory where for years the experimental and development work was carried on. The final result of this foresight and enterprise was the development of a satisfactory system, which was widely imitated. The salient features of the system were patented and sev-

eral of the more important patents were put in litigation against infringers. A large, important, and growing business has been built up under these patents, which are important assets of the Safety Company. One patent in particular was so important and fundamental in character that the principal competing company felt compelled to infringe it, and did, and finds itself faced with a penalty of over $500,000 and an injunction which has practically put it out of business. I will speak of this again later.

The important fact to be remembered here is that my appraisal of the Safety Company patents gave them a value as of March 1, 1913, of $2,304,075, and that in the ten years following that date the company distributed $6,952,710 in dividends and increased surplus nearly $500,000—all based on patents. My valuation was apparently low, as it was designed to be. And at no time—either March 1, 1913, or later—would the Safety Company have been justified in selling its patents at my figures; which is a circumstance persuasive of my conservatism in determining their value for the purposes of this present proceedings.

300 In my affidavit of December 10, 1920, it will be remembered that I divided the Safety Company's 336 patents into six groups, according to values, as follows:

| | |
|---|---|
| (1) No value, 85 patents. | |
| (2) $50 each, 83 patents aggregating | $4,125 |
| (3) $100 each, 29 patents aggregating | 2,850 |
| (4) $268 average, 36 patents aggregating | 9,650 |
| (5) $1,800 average, 68 patents aggregating | 122,450 |
| | 139,075 |
| (6) $61,850 average; 35 patents aggregating | 2,165,000 |
| Total Valuation | 2,304,075 |

The mode of arriving at the figures for the first five groups was so plainly set forth and the totals so insignificant that I think they speak for themselves. As the aggregate for the sixth group is relatively large, it is perhaps permissible to add somewhat to my original notes, so that the reasons which guided me may be made more apparent. For that purpose I have taken an even $2,000,000 of patents, representing 23 of the 35 patents of Group 6. Of course, a demonstration of this $2,000,000 carries the balance with it, as the same reasoning applies to all. The 23 patents range in valuation from $25,000 to $600,000. Of the 23 patents, 16 relate to gas lighting at a valuation of $1,085,000, and 7 relate to electric lighting at a valuation of $915,000.

301 The gas-lighting patents and their valuations are as follows:

| | | |
|---|---|---|
| (1) Systems: | | |
| 692252 | $50,000 | |
| 742775 | 100,000 | |
| 880128 | 150,000 | |
| 1024501 | 25,000 | |
| 1038691 | 30,000 | |
| 1053074 | 30,000 | |
| | | $385,000 |

| | | |
|---|---|---|
| (2) Fixtures: | | |
| 755283 | $25,000 | |
| 803884 | 25,000 | |
| 1039822 | 50,000 | |
| 1045445 | 50,000 | |
| | | $150,000 |
| (3) Mantles: | | |
| 803835 | 100,000 | |
| 814912 | 100,000 | |
| 836123 | 100,000 | |
| 845185 | 100,000 | |
| 928527 | 50,000 | |
| 948995 | 100,000 | |
| | | 550,000 |
| | | 1,085,000 |

302 The electric patents and their valuations are:

| | | |
|---|---|---|
| (4) Systems: | | |
| 747686 | $600,000 | |
| 926518 | 50,000 | |
| | | $650,000 |
| (5) Regulators: | | |
| 1163306 | 40,000 | |
| 1241908 | 50,000 | |
| 1251479 | 100,000 | |
| 1308274 | 50,000 | |
| | | 240,000 |
| (6) Suspensions: 1261746 | 25,000 | 25,000 |
| | | 915,000 |
| Total valuation of these gas-lighting and electric patents | | 2,000,000 |

I will give a little more detail of each class of patents.

(1) Gas-lighting system patents: The total valuation assigned these six patents was $385,000. They cover, among other things, a special nonleaking (and therefore safe) filling valve for use in filling gas tanks on cars with gas under pressure, and forms of regulators obviating the danger of high-pressure gas working into the low-pressure lighting pipes while permitting adjustment when installed.

According to Annual Reports of the Interstate Commerce
303 Commission, at the close of the fiscal year 1913 (June 30), there were in service a total of 51,700 passenger train cars, as follows:

| | |
|---|---|
| First Class | 22,586 |
| Second Class | 5,489 |
| Combination | 5,502 |
| Emigrant | 95 |
| Dining | 1,209 |
| Parlor | 547 |
| Sleeping (Ry. owned) | 687 |
| Baggage, Express and Postal | 12,943 |
| Other Cars | 2,692 |
| | 51,700 |

In addition, there were in service at that date some 6,784 Pullman cars, and in Canada there were about 6,000 passenger cars in use, or a grand total of 64,484 cars. Of this number substantially 39,300 had been equipped with Pintsch Gas Systems (as indicated by the serial numbers of the equipments), in this country and Canada, and 1,600 with Safety Company Electric Systems; competitors had installed some 5,400 electric equipments. There were, therefore, substantially

18,000 cars of all types then in use and available for the installation of gas or electric equipments. Assuming that 6,000 of these cars would probably be electrically equipped by the Safety Company and its competitors, and that 10,000 of the balance would be oil-burning cars which would soon become obsolete and go out of service, this would leave 2,000 cars as a number likely to be gas-equipped in the future. (This "expectation" was more than realized, as a matter of fact.) Taking the established profit of $120 per gas-equipment
304 as the basis of calculation, there would be a "natural expectancy" of profits due to this business, at the beginning of the accounting period of ..... $240,000

This is entirely disregarding the question of new cars to be built and equipped in later years.

Regulators (which are important patented features of the gas system) wear out in time. Some had to be replaced and others required repairs. Based on the experience of prior years, it was to be expected that 300 new regulators would be sold per year as replacements; in ten years this would aggregate 3,000 regulators on which a fixed profit of $24 each would be realized, totaling ..... 72,000

There would also be repairs on substantially 500 regulators per year, or a total of 5,000 in 10 years; on all such repairs there was a fixed charge carrying a profit of $8 per regulator, so this item of value would be ..... 40,000

Aside from the regulators, the equipments comprise valves and other parts which require replacement or repair; this repair-part business is an important item in Safety Company income and has maintained a very consistent figure.

305 A few items, based on actual sales during the period prior to 1913, are the following:

| | |
|---|---|
| 2,500 valves × $3.74 profit | $9,350 |
| 7,500 stems × $0.21 profit | 1,575 |
| 5,000 covers × $1.00 profit | 5,000 |
| 9,700 carriers × $0.33 profit | 3,201 |
| Profit per year | 19,126 |
| In 10 years | 191,260 |

The above replacement and repair valuations, aggregating $30,260, are for American business only; the Canadian items of similar character run about 20 percent of the American figures (based on relative number of equipments), so there should be added on this account ..... 60,650

Total valuation of this group of patents (Compared to my valuation of $385,000) ..... 603,910

(2) Gas-lighting fixture patents: These patents cover, among other things, forms of glass globes and holders therefor; the latter give a spring-support for the globes, enabling the glass to withstand the shocks of railway travel; they are also widely used on warships, where the shocks of gunfire are a serious factor.

Two of this group of patents had been in force about seven years at the beginning of the accounting period. During these seven years substantially 11,400 gas-equipments had been sold, with an average of 5 fixtures each, or 57,000 fixtures in all. Each fixture requires a
306 globe and holder therefor and substantially 60 percent of the 57,000 fixtures (or 34,200 fixtures) had been equipped under these two patents at a profit of at least $684,000. Remembering that there was a "natural expectancy" that 2,000 cars were likely to be equipped with gas systems subsequently to March 1, 1913 (an expectancy more than realized), this would have involved the sale of 10,000 new fixtures at a profit of $20 each, or a total of ..... $200,000

In addition, there were 25,000 cars equipped with obsolete "flat-flame" burners which were being rapidly remodeled under these two patents; based on experience of that period, there would be an annual remodeling of 350 cars or 1,750 fixtures; at a profit of $6.40 per fixture, this would amount to $11,200 per year, or, in 10 years, to ..... 112,000

The other two patents were issued just prior to the beginning of the accounting period and must be regarded from a different angle—the improvement they made over prior constructions. Their possession by the Safety Company has made it possible to secure about 90 percent of the railway fixture and globe business of the country. Assuming the impropriety of considering such a great business to be in store, in 1913, it would not have been unreasonable to disregard the gas-lighting factor but to anticipate a future business based on the sale of only three times the number of electric equipments above noted which had been sold in the period just preceding (1,600×3=4,800 cars); at
307 10 fixtures per car, this would involve 48,000 electric fixtures and special glassware (actually 6,701 cars were electrically equipped from 1913 to 1922, inclusive, with a minimum of 67,000 fixtures); at $5 profit per fixture and globe, this would give a figure (for comparison with my appraisal of $100,000) of---------- $240,000

This gives a total fair valuation for comparison with my appraisal of this group of $150,000 of---------- 552,000

(3) Gas-lighting mantle patents: Pintsch gas burners are of two kinds—open flame and mantle burners; the latter have been in almost universal use since 1905. Of course, the mantles are delicate affairs, and easily broken. The six patents in this group cover the hardening or strengthening of the portions of the mantle which are particularly susceptible to breakage, the mounting of the mantle to prevent vibration and consequent breakage, the manufacture of a refractory spool upon which the mantles are to be mounted, the provision of a protector to prevent the mantle being accidentally broken when lighted and to permit its safe transportation and means for safely using mantles in an inverted position.

Even the earliest of these patents covers an improved form of mantle which has been in universal use on the railways since 1905. The gas mantles on ordinary Welsbach burners, for example, are too fragile for railway use, where the shocks and jars are continuous and great. The Safety Company mantles are sturdy and rugged; they can be transported and installed safely and readily; they are protected against accidental breakage from contact with the taper-
308 holder as the burner is lighted; they do not require constant adjustment of the quantity of air and gas to make them operate satisfactorily. By March 1, 1913, there were substantially 14,188 cars equipped with gas-mantle systems; each car averaged 5 burners, or 70,940 mantles in all. Assuming 6 replacements per year per car, this meant an annual sale of mantles for these cars of 425,640. There is a profit of 25 cents per mantle, or a total of $106,410. In addition, there were the 350 cars to be remodeled from flat-flame equipments, or 3,500 in total for a ten-year period (see preceding notes), which would give an average extra load distributed over a ten-year period of 1,750 cars or 8,750 burners; at 6 replacements per year, this would involve a sale of 52,500 mantles on this item, with a profit of $13,125. Then there were the 2,000 new gas-equipments anticipated during a ten-year period; distributing these over a ten-year period there would be an average loading of 1,000 cars, or 5,000 burners; 6 replacements per burner per year would require

30,000 mantles annually, with a profit of $7,500 per year. The sum of these three items is $127,035 profit per year, or, in ten years, a total (for comparison with my appraisal figure of $550,000) of $1,270,350.

(NOTE.—The profits under the Lungren inverted fixture patents have been included under group 2, and are not repeated here.)

It is instructive to note that in 1923, ten years after the accounting date, the Safety Company actually sold 582,700 mantles, representing a profit of $145,675.

(4) The electric lighting patents: Lumping the appraisal value of these seven patents, we get a figure of $915,000.

309 This phase of the Safety Company's business was quite new in 1913 (about 4 years old) and had grown from a sale of 354 equipments in 1909 to 435 in 1912; the chief competitor (United States Light & Heating Company was very active and was a user of Safety Company methods; suit for injunction and recovery of profits was under way. It was obvious that a large business was in sight (6,701 electric car equipments were actually sold 1913–1922 at a profit of $737,000) and a conservative estimate of such business was 600 equipments per year average for 10 years, or 6,000 equipments; at $550 per equipment this indicated a probable sales income of $3,300,000, of which a 20-percent manufacturing profit would be ..... $660,000

Sales of repairs parts were also inevitable and could fairly have been taken as $125,000 per year (experience made it actually $180,000 per year, of which a 20-percent manufacturing profit would yield $25,000 per annum, or, in 10 years, a total of ..... 250,000

By March 1, 1913, the infringer above noted had sold substantially 4,000 equipments, which, at $100 profit each, could be expected to yield (and be recovered by Safety Company) a total of ..... 400,000

In addition, such infringer was continuing the sale of infringing equipments and could be expected to dispose of 1,000 more before being stopped; this would invoke (which was justified by the facts—see following notes) another ..... 100,000

Total (for comparison with $915,000 appraisal) of ..... 1,410,000

310 The principal electric lighting patent owned by the Safety Company was that to Creveling, No. 747686, which expired December 22, 1920, or over seven years subsequent to March 1, 1913. In view of the fact that this patent was exhaustively litigated and that I had given it a value as of March 1, 1913, of $600.000, it may be pertinent to recite some of the facts relative to it. The suit was against the United States Light & Heating Company for infringement and the prayer was for injunction and financial relief. The patent was held by Judge Hazel (222 Fed. Rep. 310) and the United States Court of Appeals (223 Fed. Rep. 1023) to be valid and infringed, and an accounting by a Master (J. William Ellis, Esq., of Buffalo) was ordered. The injunction was granted. The importance attached to the patent by the Courts is indicated by the following extracts from Judge Hazel's opinion (adopted by Court of Appeals):

"We are herein principally concerned, first, with the combination of means whereby the current output of the generator which is belted to the car axle and which runs at rates varying with the speed of the train, is maintained at substantially constant voltage, thus pro-

ducing steady and continuous car lighting; and, second, with the combination for protecting the storage battery from overflow or exhaustion—the means affording such protection being an automatic device which opposes the generator voltage and modifies or alters the flow of the generator current by increasing or decreasing it at variable stages or periods.

"The principal advantages claimed to attach to the patent
311 in suit are that the normal relation of battery and generator is at all times maintained and that any depletion of current in the battery by reason of lamp load or from stoppage of the train is instantly made good, thus securing continuous and steady lighting for the car.

"Although the elements of the combination in suit separately were old, they nevertheless were substantially new in combination and in their mode of cooperation, and the defense of noninfringement, in view of the liberal scope to which the patent is entitled, requires but brief attention. Both the so-called "stop charge" and "taper charge" systems of the defendant company are operated in substantially the same way as the Craveling system in suit, and they accomplish the same result. * * * A decree may be entered in favor of the plaintiff, with costs, holding claims 1 to 8, inclusive, valid and infringed."

When the case was submitted to the Master to determine how much the defendant should pay, the Safety Company withdrew any claim for "damages" and rested wholly upon its right to collect the "profits" made by the defendant in its sale of 5,060 equipments. This greatly simplified a very complex matter of accounting.

The preliminary findings of fact by the Master are thus stated in his opinion (filed Dec. 18, 1922):

"U. S. Light & Heating Company was organized January 1, 1909. It comprised the combination of three previously existing companies. These were the U. S. Light & Heating Company, of New Jersey (which had previously been manufacturing and
312 offering for sale what is known as the "Moskowitz railway lighting system"); the Bliss Electric Lighting Company, of Milwaukee, Wis.; and the National Battery Company, of Buffalo, New York. At the time of the organization of the defendant, none of the three companies named made an apparatus embodying, in an axle lighting system, means for protecting the battery from being overcharged. These three companies, prior to the consolidation, were doing but little car lighting business."

"The infringements of the defendant company began January 1, 1909, and the total business done on the infringing system, involved herein, amounted to $2,514,269.90 (Plff's Ex. 1). The amount of money actually received for the 5,060 equipments sold was, according to this same exhibit $2,453,004.01. * * * The accounting period began in January 1, 1909, and continued to and included April 30, 1914."

The importance of the Creveling Patent to the railroads was gone into with care, and it was brought out that the railroads would not purchase equipments unless they embodied the Creveling invention. As to this the Master says:

"There is testimony in the record to the effect that a system which functioned to cut out the battery protection when the lamps were turned on, was offered to the Baltimore & Ohio Railway Company, and it was rejected by that railroad for the reason that it would not protect the battery under the conditions of service on American railroads. * * * Moreover, there is the testi-

313 mony of Mr. Osborn to the effect that systems in which the battery protection was cut out when any of the lamps or fans were in use would not have been practicable for use on Pullman cars. Mr. Lemmon, the chief electrician, gave testimony to like effect as did also Mr. Dean, the vice president and general manager of that company. * * * This history clearly evidences the fact that in the opinion of the Pullman Company and the railroads the Creveling system with its regulating means for automatically discontinuing the charge when the battery was fully charged was superior to any other system then on the American market. * * * The record clearly shows that at the beginning of the accounting period, substantially the only companies manufacturing and selling electric axle lighting systems provided with battery charge control, were the plaintiff and the defendant. * * * The Master's conclusion and finding, from all of the testimony herein regarding this matter, is that the presence of the Creveling invention in the infringing system was a dominant and necessary factor in effecting the sales of that system to the Pullman Company, and to the railroads."

And the final award is thus stated:

"As a conclusion of fact and law on the whole case, and for the reasons herein set forth, which conclusion is based on the competent and material evidence herein, the Master awards the sum of $501,180.32 as accountable profits to be paid by the defendant to the plaintiff and recommends judgment therefore."

314 It was the probability of such a finding which led me, in my affidavit of December 10, 1920, to say (page 11) that this Creveling patent:

"Has been broadly sustained by Court of Appeals; several hundred thousand dollars will probably be recovered as profits and damages."

The Court (October 10, 1923), has formally approved the findings of the Master in all respects, approving the award to the Safety Company of the sum of $501,180.32 as accountable profits, and directed the entry of judgment in favor of the Safety Company for the sum of $501,180.32.

From the figures which have been submitted under the several headings a means has been provided for checking the reasonableness of my appraisal figures. This is apparent from the following comparative table:

| | Appraisal figures on part of group 6 | Calculations based on experience |
|---|---|---|
| Gas systems | $385,000 | $602,910 |
| Fixtures | 150,000 | 552,000 |
| Mantles | 550,000 | 1,270,350 |
| Electric patents | 915,000 | 1,410,000 |
| | 2,000,000 | 3,836,260 |
| Add balance of appraisal values | 304,075 | 304,075 |
| | 2,304,075 | 4,140,335 |

The fact is, as is quite apparent, that had I been asked to
315 make my appraisal in 1913, and had been given the facts then which I present herewith, I would have given a figure nearer four million dollars than two.

Before judgment is finally passed upon the conservatism of my appraisal figures, the following circumstance should be appreciated: I have worked out values aggregating nearly twice my appraisal figures, taking actual past performances as of March 1, 1913, and using that data as the basis for calculating patent-procured profits for only 10 years following such date. But why stop there? True, some important patents have expired and others are expiring, but many other patents are in force and the business is still going on and will continue to yield patent-procured profits in generous measure for years to come; ownership of the patents has enabled a commercial situation to be built up which does not end with the expiration of the patents and this value was inherent in such patent ownership on March 1, 1913. If the period for calculation be only extended from March 1, 1923, to March 1, 1928 (or five additional years), the $4,000,000 becomes $6,000,000. All of which gives point to my assertion that my appraisal figures were for the present tax-examination only and were inherently and obviously conservative.

EDWIN W. HAMMER.

Subscribed and sworn to before me this 14th day of January 1924.

LOUISE KUHNER,
*Notary Public, Queens County, No. 282.*

Certificates filed in New York County. Clerk's No. 194—Register's No. 4197.

Commission expires March 30, 1924.

[NOTARY SEAL]

316 In United States District Court

*Motion for judgment*

Filed June 23, 1932

Comes now the defendant and moves for judgment dismissing the petition and for costs on the ground that the evidence is not sufficient to sustain a judgment in favor of the petitioner and against the defendant.

PHILLIP FORMAN,
*United States Attorney for the District of New Jersey,*
*Attorney for Defendant.*
By ISAIAH S. WORTH,
*Asst. U. S. Attorney.*

317 IN UNITED STATES DISTRICT COURT

*Defendant's request for special findings of fact and conclusions of law*

Filed June 23, 1932

Comes now the defendant and requests the Court to make the following special findings of fact and conclusions of law:

I

The petitioner is a corporation organized in 1887 under the laws of the State of New Jersey, having its office at Orange, New Jersey. Petitioner was engaged in the manufacture and sale of electric lighting equipment for railway cars and in 1907 secured by assignment from John R. Creveling United States Letters Patent No. 747686, which had been issued to said assignor by the United States Commissioner of Patents in 1903 and covered a train lighting system for use on railway cars.

II

The petitioner in 1912 instituted suit in the United States District Court for the Western District of New York against the United States Light & Heating Company for the alleged infringement of the said Creveling patent. An interlocutory decree was entered by the District Court holding that the patent had been infringed on January 15, 1915, and said decree was affirmed by the Circuit Court of Appeals for the Second Circuit in July 1915.

318 Thereafter, proceedings were held before a Special Master, to whom the matter was referred, to determine the amount of recovery to which the petitioner was entitled.

III

That in July 1914, during the pendency of the infringement proceedings, receivers were appointed for the United States Light & Heating Company. By order of the Court in June 1915, all the property of said company was sold to a reorganization committee representing the creditors and stockholders of the old company, which in turn conveyed the property to a new corporation known as the United States Light & Heat Corporation. Said new company, upon the acquisition of the property, placed a mortgage thereon, naming the Guaranty Trust Company of New York as trustee to secure an issue of bonds of $1,000,000.00.

IV

That in May 1923, the Special Master rendered his report recommending an award to the petitioner of $501,180.32. Exceptions thereto were filed by both parties and such exceptions were overruled in October 1923. Immediately thereafter, the petitioner applied to the Court to bring in as additional defendants by way of a supplemental bill the new United States Light & Heat Corporation and the trustee under the mortgage. The Court directed the filing of the supplemental bill, upon which a trial was had, and the Court in August, 1924, rendered an opinion holding that the new company and the trustee were proper parties to the suit and that the claim of petitioner for the judgment of $501,180.32
319 was a lien prior and superior to the lien of the Trust Company under the mortgage on all the assets and property acquired by the new corporation at the sale in the receivership suit. In October, 1924, a decree was entered overruling the exceptions filed by both parties to the Master's report and ordering the old company, its receivers, and the new corporation to pay the petitioner the sum of $501,180.32, and further ordering that the same should be a lien on all the assets sold in the receivership suit and superior to the lien of the Trust Company. The amount of the award recommended for allowance by the Special Master was for the period January 1, 1909, to April 30, 1913, and $436,137.41 thereof was applicable to the period January 1, 1909, to March 1, 1913.

V

That after entry of the decree in October 1924 all the parties took an appeal to the Circuit Court. Subsequently, in May 1925, petitioner settled the judgment by accepting $200,000.00, which was paid at that time. The expenses of the litigation after the filing of the supplemental bill in October 1923 were $23,468.05, so that the net amount realized by the settlement after deducting said expenses was $176,531.95, of which $153,621.72 represents the pro rata sum applicable to the period January 1, 1909, to March 1, 1913.

VI

That petitioner filed its income-tax return for 1925 on May 13, 1926, showing a total tax liability of $172,610.19, which was paid in installments during 1926. In said return petitioner did not include any portion of the net amount of $176,531.95 realized in settlement of its suit for patent infringement in its net taxable income, but reported the entire amount thereof on its return as nontaxable income. No loss was claimed on the return on account of the settlement of the patent infringement litigation.

VII

That on March 9, 1929, petitioner filed a claim for refund of $69,729.18, claiming a loss as a result of the settlement of the patent infringement litigation based on the alleged March 1, 1913, value of the claim, which was rejected by the Commissioner on March 21, 1930.

VIII

That the fair market value on March 1, 1913, of petitioner's claim for the infringement of its patent, on which suit was then pending, was not in excess of $50,000.00.

CONCLUSIONS OF LAW

I

That the amount received in 1925 in settlement of the patent infringement litigation was income from property and therefore gross income within the meaning of Section 213 (a) of the Revenue Act of 1926.

II

That no part of the amount received in settlement of the patent infringement litigation in 1925 accrued prior to March 1, 1913, or at any time prior to 1925.

321

III

That petitioner's claim for patent infringement was contingent, unliquidated, uncertain, and speculative on March 1, 1913.

IV

That a claim for patent infringement, being unliquidated, contingent, speculative, and uncertain on March 1, 1913, was not a capital investment, the value of which on that date, if converted, must first be restored from the amount realized in the settlement thereof.

V

That the entire amount received in 1925 represented income which was realized in that year and was subject to tax under the statute.

VI

That the settlement of the patent infringement litigation in 1925 did not constitute a sale or other disposition of property upon which a loss can be deducted under the provisions of Section 202 (a) of the Revenue Act of 1926.

VII

That the settlement of the patent infringement litigation in 1925 did not result in a loss sustained under the provisions of Sec. 234 (a) (4) of the Revenue Act of 1926.

VIII

That the petitioner is not entitled to recover any part
322 of the tax ad interest assessed and collected for the calendar year 1925.

Respectfully submitted.

PHILLIP FORMAN,
*United States Attorney for the District of New Jersey,*
*Attorney for Defendant.*
By ISADOR S. WORTH,
*Asst. U. S. Attorney.*

In United States District Court

*Opinion*

Filed December 1, 1933

FAKE, *District Judge:* The major facts and the issues arising on them are so concisely stated in defendant's brief that the language cannot be improved upon, so I quote:

"The Safety Car Heating and Lighting Company was organized in 1887 and was engaged in the manufacture and sale of electric lighting equipment for railway cars. In 1907 it secured by assignment from John R. Creveling, United States Letters Patent No. 747686, which had been issued to said assignor by the United States Commissioner of Patents in 1903. Said patent covered a train-lighting system for use on railway cars.

323 "In January 1912 plaintiff instituted a suit for damages in the United States District Court for the Western District of New York for the alleged infringement of said patent against the United States Light and Heating Company. The suit was contested

and no action was taken thereon prior to March 1, 1913. An interlocutory decree was entered for plaintiff January 15, 1915 (222 Fed. 310) and affirmed in July 1915 (223 Fed. 1023). Thereafter, proceedings were held before a Special Master to determine the amount of the recovery to which the Safety Car Heating and Lighting Company was entitled. A report thereon was rendered in 1923 allowing damages for $501,180.32, and judgment was entered in that amount October 5, 1924. Said amount represented the recovery allowed by the Special Master for the entire period of infringement from January 1, 1909, to April 30, 1914. The amount of said sum applicable to the period prior to March 1, 1913, was $436,137.41.

"In May 1925, plaintiff accepted in settlement of said judgment the sum of $200,000. The expenses of litigation after the filing of the supplemental bill were $23,468.05 (R. 119), leaving a net amount received by plaintiff of $176,531.95, of which $153,621.72 is attributable to infringement of the patent during the period prior to March 1, 1913.

"In filing its return for the calendar year 1925, the Safety Car Heating and Lighting Company did not include any portion of the amount received in settlement of the patent litigation in its taxable net income but reported the sum of $176,531.95 as nontaxable
324 income. Thereafter, upon audit of said return, the Commissioner of Internal Revenue determined, assessed, and collected an additional tax of $22,162.07, as shown by letter dated December 18, 1929, based upon the addition to taxable income of the said sum of $176,531.95. Claim for refund was thereafter filed for $19,970.28 of the said additional tax, and a claim was also filed for $69,729.18, representing a portion of the tax paid on the return. Said claims were subsequently rejected by the Commissioner prior to institution of these suits.

"QUESTIONS INVOLVED

"The question of law involved in the suit against the Collector is whether the net amount received in settlement of a contested suit for patent infringement, which was instituted prior to March 1, 1913, is taxable income when received in 1925, while the question of law involved in the suit against the United States is whether a loss was sustained upon said settlement based on the difference between the amount received and the March 1, 1913, value of the claim for the patent infringement."

Taking up the issues in the order of their statement, we are first called upon to answer the question as to whether or not the net amount received by plaintiff in settlement of a patent suit instituted prior to March 1, 1913, and settled in 1925 is taxable income in the latter year. The net amount attributable to infringement prior to March 1, 1913, is as stated $153,621.72, and the entire amount to the day of settlement in 1925 was $176,531.95. The sum is thus
325 apportioned because the amount allocated to the period prior to March 1, 1913, is dealt with by the plaintiff as a nontaxable

asset, while defendant contends it is income for the year 1925 and taxable as such.

The values with which we are concerned had their source in a claim or chose in action, and on March 1, 1913, that chose in action had not been valued or fixed in terms of money. That it existed cannot be denied, and that it had value cannot be ignored. Nor can it be said to be a thing the value of which could not be ascertained with legal certainty as of March 1, 1913. Actually, its value was so ascertained and fixed by a Special Master, who arrived at his conclusions in terms of money by the use of admissible facts and mathematical calculations. Article 90 of Regulations 65 expressly provides that unconditional claims arising prior to March 1, 1913, whether presently payable or not, are not taxable as income accruing subsequent to that date. The prosecution of the infringement suit was necessary in this case only because the infringer refused to recognize the law and the facts, which at all times were there to be construed in plaintiff's favor. To hold that the unjust necessity for this suit constituted a condition precedent to the vesting of rights or title in plaintiff as to the damages inherent in the chose in action, would be to assume that the title did not vest because an unsound and illogical attack upon it was made, and this is, of course, absurd. When infringement was found by the decree of the District Court of the Western District of New York, its effect related back to the date of the patent and also to March 1, 1913. The reasoning upon which the conclusion here is arrived at need not be further enlarged upon, since it follows the clear logic of Hughes v. Heiner, Collector, 24 Fed. (2d) 748; affirmed 30 Fed. (2d) 789. In that
326 case, the March 1, 1913, taxable value of land, the legal title to which was then in litigation, was considered. Both the District Court and the Circuit Court of Appeals held in effect that the existence of litigation as to the title had no bearing upon the value of the land for tax valuation purposes. And so here, while the ascertainment of the value of plaintiff's choses in action was dependent upon the outcome of litigation, such litigation merely fixes the value of the preexisting rights or title.

The plaintiff settled its right to $501,180.32 for the sum of $200,000. This netted, after deducting expenses, $176,531.95, of which latter amount $153,621.72 was attributable to infringements prior to March 1, 1913. On this sum plaintiff paid a tax of $19,970.82. This tax was erroneously levied and collected, and should be returned with interest thereon from the day of payment.

Secondly, we are called upon to answer the question as to whether or not any deductable loss was suffered by plaintiff in the settlement whereby it received in 1925 less than it was entitled to.

It will be conceded that the claim or chose in action is to be valued as of March 1, 1913, and in this connection our work has been largely done for us by the Special Master who reported in the infringement suit. It is found, as stated by defendant, that the Master fixed plaintiff's damages applicable to the period prior to March 1, 1913,

at $436,137.41. Again looking to Hughes v. Heiner, Collector, Supra, for our guide, we find that the Court there fixed the value of the land at the figure which had been fixed by the courts of Pennsylvania, and by the same reasoning here, we fix the value of the chose in action or claim at the amount fixed by the Special Master, to wit: $436,137.41.

327 The facts clearly show that the defendant in the infringement suit was insolvent in 1925. Its assets had passed to another corporation, and there were divers other complications which made it advisable for the plaintiff to settle with its adversary as it did. $200,000 was not an unfair settlement of its $501,180.32 claim under all the circumstances, and certainly the difference is not in the nature of a gift. It follows that in 1925 when the settlement was consummated the plaintiff lost the difference between $436,137.41, the March 1, 1913, value of its chose in action, and the prorated portion of $200,000. ($174,040.62). This shows a loss of $262,096.79.

Judgment will be entered in these cases in conformity with the foregoing conclusions.

In United States District Court

*Findings of fact and conclusions of law*

Filed February 19, 1934

The above-entitled cause came on duly and regularly for trial and hearing before this Court, without a jury, Thomas G. Haight and Henry T. Stetson appearing for and representing the above-named plaintiff, and R. P. Hertzog, Esq., appearing for and representing the above defendant; both oral and documentary evidence having been introduced at the trial thereof on behalf of the respective parties hereto, and the evidence being closed and the cause being submitted to this Court for trial, decision, and determination, and the Court being duly advised in the premises and having rendered

328 its opinion in writing, now finds the following facts and conclusions of law:

FINDINGS OF FACT

1. The petitioner, The Safety Car Heating and Lighting Company (hereinafter described as "Safety Company") was at all the times hereinafter stated and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal office in New Jersey at 21 South Day Street, Orange, New Jersey.

2. That this suit arises under the laws of the United States of America, to wit, the Revenue Act of 1926. On March 5, 1931, petitioner filed the petition herein, duly verified, with the Clerk of this Court. Said petition set forth the full name and place of business

of the petitioner, the nature of its claim, and a statement of facts upon which the claim was based, and the money claimed. Said petition contained a prayer praying this Court for a judgment upon the facts of law. On March 14, 1931, petitioner caused a copy of said petition to be served upon the District Attorney of the United States in the District of New Jersey, and on March 11, 1931, mailed a copy of the same by registered letter to the Attorney General of the United States, and on March 16, 1931, caused to be filed with the Clerk of this Court an affidavit of such service and the mailing of such letter. On May 19, 1931, the said District Attorney filed an answer.

3. The Safety Company for several years prior to March 1, 1913, was and since that date has been and still is engaged in the manufacture and sale of electric lighting equipment for illuminating railway passenger cars by electricity, which is generated by means of a generator driven by a belt from a belt pulley under the axle
329 of the car, the electric current being stored in a storage battery under the car.

4. On December 22nd, 1903, the United States Patent Office granted Letters Patent to one John L. Creveling for improvement in systems of electrical regulation, said patent being No. 747686, and on August 1, 1907, said John L. Creveling assigned his entire right, title, and interest in said patent No. 747686 to the Safety Company, which assignment was recorded in Liber L77, page 152 of Transfers of Patents in the United States Patent Office, and that the Safety Company from the date of said assignment retained the entire right, title, and interest in said patent until it expired.

Defendant prays an exception to Finding No. 4 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

5. Patent No. 747686 was the fundamental patent which covered the current control of the generator carried on the train, while at the same time protecting the storage battery as well as the generator against overcharge or excess current.

Defendant prays an exception to finding No. 5 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

6. The Safety Company prior to January 1912 concluded that patent No. 747686 was being infringed by several of its competitors, the most serious infringement being by The United States
330 Light and Heating Company, a corporation of Maine, whose principal office was at Niagara Falls, Niagara County, New York (hereinafter called the "Old Company").

Defendant prays an exception to finding No. 6 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

7. The Old Company sold at least 4,000 equipments embodying the system covered by patent No. 747686 to the Pullman Company, and in the neighborhood of 1,000 equipments embodying the system covered by said patents to railroad companies, all of which sales were made prior to March 1, 1913.

Defendant prays an exception to finding No. 7 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

8. On January 15, 1912, the Safety Company brought suit against the Old Company in the District Court of the United States for the Western District of New York, claiming that it was infringing patent No. 747686.

9. On July 22, 1914, during the pendency of the suit described in finding 8, a suit was brought in the District Court of the United States for the Western District of New York wherein the Central Trust Company of New York was plaintiff and the Old Company was defendant, and by a decree in said suit dated July 22, 1914,
331 receivers for the Old Company were appointed and duly qualified, and thereafter they were made parties to the suit of the Safety Car described in finding 8.

10. On February 15, 1915, an interlocutory decree was entered in said Court in the suit described in finding 8 in favor of the Safety Company and against the Old Company adjudging patent No. 747686 as to claims 1 to 8, inclusive, to be valid, and that said claims were infringed by the Old Company and directing that a perpetual injunction issue permanently enjoining and restraining the Old Company and its officers, receivers, agents, attorneys, and workmen, from infringing said patent during the remainder of the life of said Letters Patent, and directing that the Safety Company recover from the Old Company and its receivers the damages sustained in or by reason of said infringement as well as the profits, gains, and savings made or realized by the Old Company and its receivers and appointing J. William Ellis, Master, to take and state the account of said gains, profits, and advantages.

11. An appeal was taken by the Old Company from the said decree described in the preceding paragraph to the United States Circuit Court of Appeals in and for the Second Circuit, and on February 25, 1915, the Old Company filed its bond upon appeal in the sum of $5,000.00, which bond was approved by the Court and was ordered to operate as a supersedeas, staying the decree entered on February 15, 1915, and described in finding 10 in all respects as to the injunction as well as to the accounting and also as to costs.

12. On July 2, 1915, the United States Circuit Court of Appeals for the Second Circuit affirmed with costs the decree of the District Court dated February 15, 1915, in the suit described in finding 10.

13. The District Court of the United States for the
332 Western District of New York on July 20, 1915, entered an

order reinstating the interlocutory decree entered on February 15, 1915, in the suit described in finding 8, in all respects.

14. On June 2, 1915, the District Court of the United States for the Western District of New York in the suit of the Central Trust Company of New York against the Old Company made an order directing that all of the property of the Old Company be sold, and paragraph 12 of said order provided in part as follows:

"The purchaser shall assume all unmatured obligations of the defendant, The United States Light & Heating Company, arising out of the operations of the plant and business of the defendant as a going concern, including all claims for damages for alleged infringement by the defendant of any letters patent of the United States, etc."

15. On July 1, 1915, the property described in the order for sale in the next preceding finding was sold to the reorganization committee representing the creditors and stockholders of the Old Company, and on July 31, 1915, said sale was confirmed by the said Court and the receivers directed to deliver a deed conveying the property sold.

15. (a) On July 31, 1915, the District Court in the suit described in finding 14 made an order approving the sale of the property of the Old Company and directing the receivers to execute proper instruments conveying and transferring the property sold to the Stockholders' Protective Committee or to the U. S. Light & Heat Corporation (hereinafter described as the "New Company"),
333 as nominee and assignee of said committee as directed by said order of sale of June 2, 1915, the form of conveyance thereof to be approved by said Court and to contain such conditions and provisions as may be suitable and proper.

16. That in pursuance of the order of said Court recited in findings 15 (a), James O. Moore, James A. Roberts, and J. Allen Smith, as receivers of the Old Company, and the Old Company executed and delivered to the New Company a deed conveying the property of the Old Company, which deed was approved by the District Court and recited the order of sale of said Court dated June 2, 1915, and the order of confirmation thereof dated July 31, 1915, recited that the Stockholders' Protective Committee purchased said property and thereafter duly assigned its bid to the New Company (described in said deed as the purchaser), and said deed recited that the purchaser did assume all the obligations and liabilities under said bid and the terms of sale as contained in the order of June 2, 1915, directing such sale. Said deed, after being duly acknowledged, was recorded in the office of the Clerk of Niagara County, New York, on August 5, 1915, at 11:13 A. M. in Liber 388 of Deeds, at page 250.

17. The New Company under date of June 1, 1915, executed and delivered to the Guaranty Trust Company of New York, a New York corporation, as Trustee (hereinafter described as the "Trust Company") a Deed of Trust securing $1,000,000 of First Mortgage Sink-

ing Fund Six Per Cent Twenty Year Gold Bonds in the denominations of $100, $500, and $1,000, as described in said Deed of Trust; said Deed of Trust covered all the property described in the deed of conveyance recited in finding 16. Said Deed of Trust was
334 recorded in the office of the Clerk of Niagara County, New York, on August 5, 1915, at 11:21 A. M., in Liber 359 of Mortgages, at page 364.

18. On May 26, 1923, J. William Ellis, Master, appointed by the decree of February 15, 1915, in the suit of the Safety Company described in finding 8, filed his report recommending an award to the Safety Company *Company* of $501,180.32 for profits made by the Old Company for the accounting period covered by his report, viz: January 1, 1909, to April 30, 1914, inclusive. Of these profits $436,137.41 represented profits up to March 1, 1913.

19. Both the Safety Company and the Old Company filed exceptions to the Master's report, the Safety Company claiming that the award was not large enough, and the Old Company claiming that the award was excessive, and thereafter a hearing was had on the exceptions, and on October 10, 1923, the District Court filed an opinion overruling all the exceptions filed by both parties and affirming the report of the Master.

20. On October 23, 1923, the District Court of the United States for the Western District of New York, in the suit described in finding 8, made an order bringing into the suit as addit'onal defendants the New Company and the Trust Company, and on October 6, 1924, said Court entered a decree overruling the exceptions filed by the plaintiff and the defendants to the report of the Special Master and confirming said report in all respects, and directed that the Safety Company recover from the Old Company, and its receivers, and the New Company jointly and severally, $501,180.32, together with its costs, charges, and disbursements to be taxed, and that said sums should be a lien prior and superior to the lien of the mortgage exe-
335 cuted by the New Company to the Trust Company and described in finding 17, on all the assets and property of the Old Company which were sold under the decree of the Court in the suit of the Central Trust Company of New York dated June 2, 1915, and also a lien on all the property of the New Company, and that the Old Company, its receivers, and the New Company, within sixty (60) days of the entry of the decree, should pay to the Safety Company the said sum of $501,180.32, with interest from the 6th day of October 1924, with its costs, charges, and disbursements as taxed, and that if such payment should be made to the Safety Company it should execute a release of discharge of the lien declared by said decree in form for record, and that in case of a default in the payment of the above amount within sixty (60) days from the date of the entry of said decree, the Safety Company should have leave to apply to said Court, upon notice to the other parties, for a further order for the carrying into effect of said decree.

21. On March 1st, 1913, the Old Company was solvent and had assets sufficient to pay the claim of the Safety Company, if the amount thereof could have been determined and the liability established at that time.

Defendant prays an exception to finding No. 21 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

22. After the entry of the decree of October 6, 1924, described in finding 20, all the parties took an appeal to the Circuit Court of Appeals for the Second Circuit; the Safety Company appealing on the ground that the award of the Master was not large enough; the Old Company, its receivers, and the New Company contend-
336 ing that the award was excessive; the New Company and the Trust Company contending that the judgment should not be a lien on all the assets sold in the suit of the Central Trust Company of New York under the decree of June 3, 1915, and should not be a lien on said assets prior to that of the Trust Company.

23. Unless the decree of October 6, 1924, was affirmed by the Circuit Court of Appeals, the Safety Company was not certain that it could collect its judgment, as the New Company was the only one that had any resources, and unless it could maintain its lien as provided by the decree of October 6, 1924, it would only be a general creditor of the New Company, and at this time the New Company was not in good financial condition. The litigation had covered a period of thirteen (13) years and had been very expensive to the Safety Company.

24. The Safety Company in 1925 accepted $200,000 in satisfaction of its said claim and judgment of $501,180.32. That part of the judgment representing profits prior to March 1, 1913, was $436,137.41.

25. The claim of the Safety Company for infringement of said patents by the Old Company prior to March 1, 1913, had a fair market value on March 1, 1913, of at least said amount of $436,137.41.

Defendant prays an exception to Finding No. 25 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

26. The prorated portion of the amount received in settle-
337 ment and satisfaction of the said claim and judgment as aforesaid, viz: $200,000 up to March 1, 1913, was $174,040.62.

27. When the Safety Company settled its said claim and judgment as set forth in finding 24 it suffered a loss in respect to property acquired before March 1, 1913, equal to the difference between the said sum of $174,040.62 and the value of its said claim as of March 1, 1913, which in finding 25 is found to be $436,137.41, the loss to the Safety Company thus being $262,096.79.

Defendant prays an exception to Finding No. 27 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

28. On May 13, 1926, the Safety Company, in accordance with the Acts of Congress relating to Income Taxes, filed with Edward E. Gnichtel, Esq., who was then Collector of Internal Revenue for the Fifth District of New Jersey, a return of its net income for the calendar year 1925, which return showed a net income of $1,473,187.13 and a tax due the United States of America in the amount of $172,610.19, and the Safety Company paid said tax on the following dates:

| | |
|---|---|
| March 13, 1926 | $46,000.00 |
| June 14, 1926 | 36,852.89 |
| September 9, 1926 | 44,878.65 |
| December 14, 1926 | 44,878.65 |

29. In the income-tax return for 1925 the Safety Company did not claim as a deduction from its gross income the loss of $262,096.79 described in finding 24.

338 30. The Safety Company on March 9, 1929, filed with the Collector of Internal Revenue for the Fifth District of New Jersey a claim asking for the refund of $69,729.18 of the income tax paid by it for the calendar year 1925, claiming that its claim against the Old Company was on March 1, 1913, worth at least $690,000 and that the claim was finally settled in 1925 and the net amount received by it as the result of the settlement was $153,621.72, making a net loss of $536,378.28, which at 13%, the rate of income tax for 1925, equalled $69,729.18; thereafter the claim was referred to the Commissioner of Internal Revenue and under date of March 21, 1930, was denied and disallowed by said Commissioner.

31. That this suit is brought against the United States because Edward E. Gnichtel, Esq., who was then Collector of Internal Revenue for the Fifth District, was at the time of the commencement of this suit on March 5, 1931, no longer in office as such Collector.

32. The Safety Company suffered a loss during the taxable year 1925, which was not compensated for by insurance or otherwise in the sum of $262,096.79, and the income tax on which was 13%, or $34,072.58, with interest from December 15, 1926.

Defendant prays an exception to finding No. 32 contained in the foregoing paragraph, which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

CONCLUSIONS OF LAW

1. That the petitioner is entitled to maintain this suit and, under the Acts of Congress relating to the imposition and collection
339 of income taxes, suffered a loss during the year 1925, which was not compensated for by insurance or otherwise in the amount of $262,096.79.

Defendant prays an exception to conclusion of law No. 1 contained in the foregoing paragraph which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

2. That the petitioner is entitled to recover from the United States of America, the sum of $34,072.58, with interest at 6% on $2,191.25 from March 15, 1926, to March 25, 1930, amounting to $529.55, and with interest on $2,720.80 from March 25, 1930, to the date hereof, amounting to $635.12, and with interest on $31,881.33 from December 15, 1926, to the date hereof, amounting to $13,730.09, making a total sum of $48,967.34, with costs.

Defendant prays an exception to conclusion of law No. 2 contained in the foregoing paragraph which exception is allowed by the Court.

GUY L. FAKE, *U. S. D. J.*

Dated: February 19, 1934.

GUY L. FAKE,
*United States District Judge.*

340 In United States District Court

*Rule for judgment*

Filed February 19, 1934

Upon the findings of fact and conclusions of law filed herein on the 19th day of February, 1934, it is, on this 19th day of February, 1934, on motion of Henry T. Stetson, Attorney for Petitioner, and Thomas G. Haight, of Counsel, ordered that judgment final be entered against the defendant United States of America in favor of the petitioner, The Safety Car Heating and Lighting Company, for the sum of $34,072.58 together with interest at 6% on $2,191.25 from March 15, 1926, to March 25, 1930, amounting to $529.55 and with interest on $2,720.80 from March 25, 1930, to the date hereof, amounting to $635.12 and with interest on $31,881.33 from December 15, 1926, to the date hereof, amounting to $13,730.09, making a total sum of $48,967.34, besides costs of suit to be taxed.

GUY L. FAKE,
*United States District Judge.*

Defendant prays an exception to the judgment herein entered in favor of the petitioner and against the defendant and to the denial of defendant's motion for judgment, and to the denial of defendant's request for the finding of fact contained in paragraph VIII of its requests for special findings of fact and to the denial of its requests for conclusions of law in paragraphs I to VIII, inclusive, filed herein, all of which exceptions are allowed by the Court.

GUY L. FAKE,
*United States District Judge.*

341 In United States District Court

*Judgment*

February 19, 1934

Judgment Final for Plaintiff for Forty-Nine Thousand Nine Dollars and Fifty-Nine Cents.

| | |
|---|---|
| Damages | $48,967.34 |
| Costs | 42.25 |
| | 49,009.59 |

Judgment signed.

GUY L. FAKE,
*Judge.*

342 In United States District Court

*Petition for appeal*

Filed February 27, 1934

To the Honorable Guy L. Fake, Judge of the United States District Court for the District of New Jersey:

The petition of the defendant, the United States of America, in the above entitled cause, respectfully shows to the Court that the said defendant, feeling itself aggrieved by the judgment entered February 19, 1934, in the above entitled cause, hereby appeals from the said judgment to the United States Circuit Court of Appeals for the Third Circuit and prays that this appeal may be allowed and a transcript of the record and proceedings and papers upon which said judgment was made, may be sent to the United States Circuit Court of Appeals for the Third Circuit in accordance with law and the practice of this Court.

Defendant, your petitioner, further prays that citation of appeal issue and be served upon the plaintiff herein according to law and the practice of the Court.

Defendant, your petitioner, further prays that after due hearing, judgment be entered reversing the judgment of the said District Court.

The defendant, your petitioner, further prays for all orders necessary in the premises and for general relief and your petitioner will ever pray, etc.

HARLAN BESSON,
*United States Attorney for the District of New Jersey,*
*Attorney for Defendant.*
By ISADOR S. WORTH,
*Asst. United States Attorney.*

Dated: FEBRUARY 21, 1934.

343 In United States District Court

*Order allowing appeal*

Filed February 27, 1934

And Now, to wit, on this 26th day of February, A. D. 1934, upon consideration of the foregoing petition, the appeal therein prayed for is allowed, and pending final determination of this appeal the judgment against the United States of America is hereby stayed.

GUY L. FAKE,
*United States District Judge.*

344 In United States District Court

*Notice of appeal*

Filed February 27, 1934

To: Messrs. WALL, HAIGHT, CAREY & HARTPENCE,
*Counsellors at Law,*
*15 Exchange Place, Jersey City, N. J.*

Take Notice, that the defendant, the United States of America, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the judgment entered on February 19, 1934, allowing the plaintiff to recover the sum of $48,967.34, plus costs of suit to be taxed against the United States of America.

Dated: FEBRUARY 21, 1934.

Respectfully,

HARLAN BESSON,
*United States Attorney,*
By ISADOR S. WORTH,
*Asst. U. S. Attorney.*

345 [Citation to usual form filed March 1, 1934, omitted in printing.]

346 In United States District Court

*Order extending citation*

Filed May 4, 1934

This matter being opened to the Court by Harlan Besson, United States Attorney for the District of New Jersey (by Isador S. Worth, Assistant United States Attorney), for good cause shown, the citation in the above entitled cause is hereby extended from the seventh day of May 1934 to the seventh day of June 1934.

Dated: MAY 3, 1934.

GUY L. FAKE, *Judge.*

347 In United States District Court

*Assignment of errors*

Filed April 16, 1934

Now comes the United States of America, defendant in the above-entitled cause, by its attorney, and in connection with its appeal says that in the record, proceedings, findings of fact, conclusions of law, and final judgment in said cause manifest errors intervened to its prejudice and injury and therefore, in connection with its said appeal assigns the following errors upon which it relies to reverse the judgment entered herein:

I

That the Court erred in ordering judgment to be entered in favor of the petitioner and against the defendant.

II

That the Court erred in refusing to grant defendant's motion for judgment filed at the close of the evidence.

III

That the Court erred in refusing to grant each and every part of defendant's requests for special findings of fact and conclusions of law.

IV

That the Court erred in that the special findings of fact made and entered by the Court do not support the judgment entered pursuant to its order.

348 V

That the Court erred in finding as a matter of fact (Finding No. 4) that

"On December 22nd, 1903, the United States Patent Office granted Letters Patent to one John L. Creveling for improvement in systems of electrical regulation, said patent being No. 747,686, and on August 1, 1907, said John L. Creveling assigned his entire right, title, and interest in said patent No. 747, 686 to the Safety Company, which assignment was recorded in Liber L77, page 152 of Transfers of Patents in the United States Patent Office, and that the Safety Company from the date of said assignment retained the entire right, title, and interest in said patent until it expired."

for the reason that there is no substantial evidence in the record to support said finding.

VI

That the Court erred in finding as a matter of fact (Finding No. 5) that

"Patent No. 747,686 was the fundamental patent which covered the current control of the generator carried on the train, while at the same time protecting the storage battery as well as the generator against overcharge or excess current."

for the reason that there is no substantial evidence in the record to support said finding.

349

VII

That the Court erred in finding as a matter of fact (Finding No. 6) that

"The Safety Company, prior to January 1912, concluded that patent No. 747686 was being infringed by several of its competitors, the most serious infringement being by The United States Light and Heating Company, a corporation of Maine, whose principal office was at Niagara Falls, Niagara County, New York (hereinafter called the 'Old Company')."

for the reason that there is no substantial evidence in the record to support said finding.

VIII

That the Court erred in finding as a matter of fact (Finding No. 7) that

"The Old Company sold at least 4,000 equipments embodying the system covered by patent No. 747686 to the Pullman Company, and in the neighborhood of 1.000 equipments embodying the system covered by said patents to railroad companies, all of which sales were made prior to March 1, 1913."

for the reason that there is no substantial evidence in the record to support said finding.

IX

That the Court erred in finding as a matter of fact (Finding No. 21) that

350 "On March 1st, 1913, the Old Company was solvent and had assets sufficient to pay the claim of the Safety Company, if the amount thereof could have been determined and the liability established at that time."

for the reason that there is no substantial evidence in the record to support said finding.

X

That the Court erred in finding as a matter of fact (Finding No. 25) that

"The claim of the Safety Company for infringement of said patent by the Old Company prior to March 1, 1913, had a fair market value on March 1, 1913, of at least said amount of $436,137.41."
for the reason that there is no substantial evidence in the record to support said finding.

XI

That the Court erred in finding as a matter of fact (Finding No. 27) that

"When the Safety Company settled its said claim and judgment as set forth in Finding 24, it suffered a loss in respect to property acquired before March 1, 1913, equal to the difference between the said sum of $174,040.62 and the value of its said claim as of March 1, 1913, which in Finding 25 is found to be $436,137.41;
351 the loss to the Safety Company thus being $262,096.79."
for the reason that there is no substantial evidence in the record to support said finding.

XII

That the Court erred in finding as a matter of fact (Finding No. 32) that

"The Safety Company suffered a loss during the taxable year 1925 which was not compensated for by insurance or otherwise in the sum of $262,096.79, and the income tax on which was 13% or $34,072.58 with interest from December 15, 1926."
for the reason that there is no substantial evidence in the record to support said finding.

XIII

That the Court erred in ruling as a conclusion of law (Conclusion of Law No. 1)

"That the petitioner is entitled to maintain this suit and, under the Acts of Congress relating to the imposition and collection of income taxes, suffered a loss during the year 1925 which was not compensated for by insurance or otherwise in the amount of $262,096.79."
for the reason that said Conclusion is not supported by any substantial evidence in the record.
352

XIV

That the Court erred in ruling as a conclusion of law (Conclusion of Law No. 2)

"That the petitioner is entitled to recover from the United States of America the sum of $34,072.58, with interest at 6% on $2,191.25 from March 15, 1926, to March 25, 1930, amounting to $529.55 and with interest on $2,720.80 from March 25, 1930, to the date hereof, amounting to $635.12 and with interest on $31,881.33 ffom December 15, 1926, to the date hereof, amounting to $13,730.09, with costs."
for the reason that said conclusion is not supported by any substantial evidence in the record.

XV

That the Court erred in failing and refusing to find as a matter of fact, as requested by defendant (defendant's requested Finding No. XIII).

"That the fair market value on March 1, 1913, of petitioner's claim for the infringement of its patent, on which suit was then pending, was not in excess of $50,000.00."

XVI

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. 1)

353 "That the amount received in 1925 in settlement of the patent infringement litigation was income from property and therefore gross income within the meaning of Section 213 (a) of the Revenue Act of 1926."

XVII

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. II)

"That no part of the amount received in settlement of the patent infringement litigation in 1925 accrued prior to March 1, 1913, or at any time prior to 1925."

XVIII

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. III)

"That petitioner's claim for patent infringement was contingent, unliquidated, uncertain, and speculative on March 1, 1913."

XIX

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. IV)

"That a claim for patent infringement, being unliquidated, contingent, speculative, and uncertain on March 1, 1913, was not a capital investment the value of which on that date, if con-

354 verted, must first be restored from the amount realized in the settlement thereof."

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. V)

"That the entire amount received in 1925 represented income which was realized in that year and was subject to tax under the statute."

XXI

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. VI)

"That the settlement of the patent infringement litigation in 1925 did not constitute a sale or other disposition of property upon which a loss can be deducted under the provisions of Section 202 (a) of the Revenue Act of 1926."

XXII

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. VII)

"That the settlement of the patent infringement litigation in 1925 did not result in a loss sustained under the provisions of Section 234 (a) (4) of the Revenue Act of 1926."

355 XXIII

That the Court erred in failing and refusing to rule as a conclusion of law, as requested by defendant (defendant's requested conclusion of law No. VIII).

"That the petitioner is not entitled to recover any part of the tax and interest assessed and collected for the calendar year 1925."

Wherefore, defendant prays that the judgment heretofore rendered by the District Court herein be reversed and that the said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing petitioner's petition.

HARLAN BESSON,
*United States Attorney,*
*Attorney for Defendant.*
By ISADOR S. WORTH,
*Asst. U. S. Attorney.*

356 In United States District Court

*Bill of exceptions*

Filed June 7, 1934

Be it remembered that this cause came on regularly for trial at the courtroom of the above-entitled Court in the Lefcourt Building, Newark, New Jersey, on March 17, 1932, before the Honorable Guy L. Fake, Judge of the above-entitled Court, sitting without the jury, upon the petition of the petitioner, The Safety Car Heating & Lighting Company, and the answer of the defendant, United States of America; Messrs. Wall, Haight, Carey, and Hartpence, and Thomas G. Haight, Esq., and Henry T. Stetson, Esq., appearing for the peti-

tioner, Phillip Forman, Esq., United States Attorney, Oliver Randolph, Esq., Assistant United States Attorney, and R. P. Hertzog, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the defendant.

Whereupon the following proceedings were had, to wit:

Pursuant to the stipulation of the parties, acting by and through their respective attorneys of record herein, entered into in open Court, the trial of the above-entitled case was consolidated with the trial of an action pending in this Court wherein the petitioner herein is the plaintiff, and John R. Rogers, Collector of Internal Revenue for the Fifth District of New Jersey, is the defendant and
357 wherein a jury was waived by stipulation in writing duly entered into by the respective parties to said action and filed in said cause.

Whereupon the petitioner, in order to meet the issues tendered by it, called the following witnesses, to-wit, George E. Hulse, Delos G. Hayne, and Edwin W. Hammer, and the defendant called the following witness, to-wit, Arthur S. Brown, all of whom were duly sworn and examined, their evidence being taken down in shorthand by the official Court reporter, who thereafter transcribed the same in typewriting. The transcript of the said testimony, together with the hereinafter mentioned exhibits or excerpts thereof offered both by the petitioner and the defendant and duly received in evidence and marked as follows:

Exhibit No.: Description

P–1—Four checks of petitioner, aggregating $172,610.19, representing original tax paid for the calendar year 1925.

P–2—Pages 1, 2, 3, and 4 of the income tax return of petitioner and subsidiaries for 1925 (Form 1122).

P–3—Copy of patent 747686, to John L. Creveling.

P–4—Copy of assignment of patent 747686, dated Aug. 1, 1907.

P–5—Copy of letter and computation of the Commissioner of Internal Revenue, assessing additional tax.

P–6—Copy of interlocutory decree, Feb. 15, 1915, U. S. District Court, Western District of New York.

358 P–7—Copy of mandate of C. C. A. for the Second Circuit dated July 2, 1915.

P–8—Copy of decree of U. S. District Court, Western District of New York, dated July 20, 1915.

P–9—Copy of decree of U. S. District Court, Western District of New York, for $501,180.32, with costs.

P–10—The following portions of the Master's Report in the accounting proceedings, to-wit, commencing on page M–64 at the heading, "Figures of the Account", page M–65, page M–66, and page M–67, down to the heading, "Accounting Issues"; so much of page M–84 as commences with the second paragraph on said page,

beginning with the words, "These various items", and page M–85 to the heading "Defendant's Improvements"; also page M–104, commencing with the second paragraph on said page, page M–105, and page M–106 to the heading "Plaintiff's Exceptions to the Master's Report."

P–11—Certified copy order U. S. District Court, Western District of New York, July 22, 1914.

P–12—(a) Decree June 2, 1915.
(b) Report of Sale.
(c) Certified copy order confirming sale.

359 P–13—Certified copy deed from the Receivers of United States Light & Heating Company to U. S. Light & Heat Corporation, excepting the description of the land, the acknowledgments, and county clerk's certificates.

P–14—Abstract of Mortgage, June 1, 1915, U. S. Light & Heat Corporation to Guaranty Trust Company of New York.

P–15—Photostatic copies of parts of the following pages from Poor's Manual relating to United States Light & Heating Company, to-wit, 2635 and 2636, 1912 Edition, 1081, 1913 Edition, and 2326 and 2327, 1914 Edition.

G–1—Protest filed by petitioner before Commissioner of Internal Revenue, stamped: "Received Nov. 13, 1928", with attached affidavit of Edwin W. Hammer.

G–2—Supplemental affidavit of Edwin W. Hammer, before Treasury Department, signed and sworn to January 14, 1924.

are of the records and files in this action and are hereby referred to and made a part hereof as though the said testimony and the said Exhibits had been set out in haec verba herein.

The said testimony, together with the said exhibits and excerpts therefrom above noted, constitute all of the evidence adduced at the said trial.

And be it further remembered that, on June 23, 1932, the de-
360 fendant duly made and filed a written motion for judgment dismissing plaintiff's petition herein, which said motion the Court, upon due consideration thereof, thereafter, and on February 19, 1934, denied; to which action of the Court the defendant, by counsel, then and there duly excepted, which said exception was then and there duly allowed by the Court, such allowance being then and there by the Court duly noted on the Rule for Judgment, which was by the Court, and on said 19th day of February 1934 made and entered in said action in favor of the petitioner and against the defendant therein.

The said motion and Rule for Judgment, together with the said rulings of the Court thereon, the defendant's said exception, and the Court's said order allowing the same are of the records and files

in this cause and are hereby referred to and made a part hereof as though the same had been set out in haec verba herein.

And Be It Further Remembered that at the time of the making and filing of the said motion for judgment, to-wit, on June 22, 1932, the defendant duly requested the Court in writing to make certain special findings of fact and conclusions of law; which said request the Court, upon due consideration thereof, thereafter, and on February 19, 1934, denied; and thereupon the defendant, by counsel, then and there duly excepted to the refusal of the Court to make its requested finding numbered VIII and to the refusal of the Court to make its requested conclusions of law numbered I to VIII, inclusive, and each and every of them; which said exceptions were then and there duly allowed by the Court, such allowance being there and then by the Court duly noted on the above-mentioned Rule for Judgment.

361 The said special findings of fact and conclusions of law so requested by the defendant, as well as the said exceptions and order allowing the same, are of the records and files of this Court and are hereby referred to and made a part hereof as though the same had been set out in haec verba herein.

And Be It Further Remembered that thereupon the Court made his special findings of fact, numbered 1 to 32, inclusive, and conclusions of law, numbers 1 and 2, which are of the records and files of this action and are hereby referred to and made a part hereof as though the same had been set out *in haec verba* herein. And thereupon the defendant by counsel duly excepted to the action of the Court in making each of the said findings numbered 4, 5, 6, 7, 21, 25, 27 and 32, and to the action of the Court in making each of said conclusions of law, numbered 1 and 2; each of which said exceptions was then and there duly allowed by the Court, such allowance being then and there duly noted by the Court on each of the said findings of fact and conclusions of law.

Comes now the defendant, The United States of America, within the time allowed by law and presents the foregoing as and for its Bill of Exceptions of the rulings of the Court made in the course of the trial of said cause and respectfully moves the Court to sign, seal, settle, and allow the same as and for a full, true and correct Bill of Exceptions of the said rulings.

HARLAN BESSON,
*United States Attorney.*
By ISADOR S. WORTH,
*Asst. U. S. Attorney.*

362 Upon the foregoing motion of the defendant, the petitioner appearing by counsel and waiving notice of the said motion in open Court, and it satisfactorily appearing to the undersigned Judge of the above entitled Court that the foregoing is a full, true and correct Bill of Exceptions of the rulings of this Court made in the course of the trial of this cause adverse to the defendant, The United States of America, and duly excepted to by the said

defendant, and it further satisfactorily appearing that the said Bill of Exceptions is presented for settlement within the time allowed by law, Now, therefore, within the time allowed by law, it is ordered, and this Court does order, that the same be, and hereby is, signed, settled, sealed, and allowed as and for a full, true and correct Bill of Exceptions in respect of the said rulings and exceptions. And, I, the undersigned Judge of the above entitled Court, do hereby certify that the said Bill of Exceptions by reference embodies all of the proceedings had and evidence adduced in the course of the said trial and considered by me in arriving at the decision in this case, and that the said Bill of Exceptions presents for review upon appeal all matters pertinent to the rulings of the Court made during the course of the trial of this cause referred to in the said Bill of Exceptions and duly excepted to by the defendant.

Done at Newark, New Jersey, this 6th day of June, 1934.

GUY L. FAKE, *District Judge.*

363 IN UNITED STATES DISTRICT COURT

*Stipulation and Order as to Printing Record*

Filed June 7, 1934

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action, acting by and through their respective attorneys of record herein, that only so much of the petitioner's exhibits marked P-2, P-10, P-13, and P-14 shall be printed in the transcript of the record on appeal in the above-entitled case as is referred to in the defendant's Bill of Exceptions this day settled; that is to say, there shall be printed in the said transcript only pages 1, 2, 3, and 4, inclusive, of exhibit numbered P-2, being the income-tax return of the petitioner, and its subsidiaries for 1925; only the following portions of exhibit numbered P-10, being the Master's Report in the accounting proceedings, to-wit, commencing on page M-64 thereof at heading " Figures of the Account ", page M-65, page M-66, and page M-67, down to the heading "Accounting Issues "; so much of page M-84 as commences with the second paragraph on said page beginning with the words "These Various Items ", and page M-85 to the heading " Defendant's Improvements "; also page M-104 commencing with the second paragraph on said page, page M-105, and page M-106 to the heading " Plaintiff's Exceptions to the Master's Report "; certified copy of deed from the Receivers of the United States Light & Heating Company to the U. S. Light & Heat Corporation, being exhibit numbered P-13, excepting the description of the land, the acknowledgments, and the County Clerk's certificates;

364 and only an abstract of Mortgage, June 1, 1915, U. S. Light & Heat Corporation to Guaranty Trust Company of New York, being exhibit numbered P-14; the said portions of and excerpts from the said exhibits being the only parts thereof which

were considered by the trial Court in arriving at his decision in said case.

And It Is Further Stipulated and Agreed that the original exhibits, or the photostatic copies thereof which were substituted therefor at the trial of said cause, may be submitted to the United States Circuit Court of Appeals for the Third Circuit, and, if a review of this case is had by the Supreme Court of the United States, then also to that Court, in order that said Court or Courts may, if deemed necessary or desirable, have an opportunity of examining the whole of said exhibits.

And It Is Further Stipulated and Agreed that an order may be made and entered herein approving this stipulation.

Dated June 6, 1934.

HENRY T. STETSON,
*Attorney for the Petitioner.*
HARLAN BESSON,
*United States Attorney.*
By I. S. WORTH,
*Assistant to the United States Attorney.*

Upon the reading of the foregoing stipulation and sufficient cause appearing therefor, it is Ordered, and this does Order, that the same be, and hereby is, approved.

Done at Newark, New Jersey, this 6th day of June 1934.

GUY L. FAKE, *District Judge.*

365 IN UNITED STATES DISTRICT COURT

*Praecipe for record*

Filed June 7, 1934

*To the Clerk of the Above-Entitled Court:*

Please prepare, print, and certify a transcript of the record on appeal in the above-entitled case consisting of the following papers, records, and files in said action:

1. Docket Entries.
2. The petitioner's petition.
3. The defendant's answer thereto.
4. The defendant's Bill of Exceptions, settled June 6, 1934.
5. A transcript of all the proceedings had and testimony adduced at the trial of said action.
6. All exhibits received in evidence, or such portions thereof or excerpts therefrom as are mentioned in the defendant's Bill of Exceptions and in the Stipulation re Exhibits, and order thereon, this day filed herein.
7. Defendant's motion for judgment dismissing petitioner's petition herein.

8. Defendant's request of special findings of fact and conclusions of law.
9. The opinion of the trial Court, findings of fact and conclusions of law and exceptions noted thereon.
366 10. Rule for judgment and the Court's endorsement thereon of exceptions taken and allowed.
11. Judgment.
12. Petition for appeal.
13. Order allowing appeal.
14. Notice of appeal.
15. Citation and orders extending the same for the return thereof.
16. Assignments of error.
17. Stipulation and order re Exhibits.
18. This Praecipe.

Dated: June 6, 1934.

HARLAN BESSON,
UNITED STATES OF AMERICA,
By ISADOR S. WORTH,
*Assistant to United States Attorney.*

367 In United States District Court

Order extending citation

Filed June 7, 1934

This matter being opened to the Court by Harlan Besson, United States Attorney for the District of New Jersey (by Isador S. Worth, Assistant United States Attorney), for good cause shown, the citation in the above-entitled cause is hereby extended from the seventh day of June to the seventh day of July 1934.

GUY L. FAKE, *Judge.*

Dated June 6, 1934.

368 In United States District Court

Order extending citation

This matter being opened to the Court by Harlan Besson, United States Attorney for the District of New Jersey (by Isador S. Worth, Assistant United States Attorney) for good cause, shown, the citation in the above-entitled cause is hereby extended from the seventh day of July 1934 to the twenty-second day of July 1934.

GUY L. FAKE, *Judge.*

Dated July 6, 1934.

[Clerk's certificates to foregoing transcript omitted in printing.]

371 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5445. October term, 1934

UNITED STATES OF AMERICA, APPELLANT

*vs.*

THE SAFETY CAR HEATING & LIGHTING COMPANY, APPELLEE

*Minute entry*

And afterwards, to wit, the 9th day of November 1934 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley, and Honorable J. Whitaker Thompson, circuit judges, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 26th day of February 1935 come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

372 In United States Circuit Court of Appeals for the Third Circuit

No. 5445. October term, 1934

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

*v.*

THE SAFETY CAR HEATING AND LIGHTING COMPANY, PETITIONER-appelle

No. 5446. October term, 1934

JOHN R. ROGERS, COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH District of New Jersey, defendant-appellant

*v.*

THE SAFETY CAR HEATING AND LIGHTING COMPANY, PLAINTIFF-appellee

Appeals From the District Court of the United States for the District of New Jersey

*Opinion*

Filed February 26, 1935

Before BUFFINGTON, WOOLLEY, and THOMPSON, Circuit Judges

373 BUFFINGTON, *J.:* These two cases, one brought by the taxpayer against the United States, the other against the collector, involved the same facts and the general claim that taxes had

been illegally collected from the taxpayer and that it was entitled to recover them back. The cases were tried together by a judge who was empowered by statute to try the first case and by written stipulation the second. The cases received detailed study by him and by reference to his finding of facts and conclusions of law we save needless repetition.

The questions involved are as stated by Government counsel as follows:

"Whether the appellee, Safety Car Heating and Lighting Company, (1) sustained a deductible loss in the taxable year 1925 in the difference between the alleged March 1, 1913, fair market value of its claim for damages on account of the infringement of its Creveling patent and the amount of a settlement made of said claim in the said taxable year for less than such alleged fair market value; and (2) whether the appellee derived taxable income in said year as a result of such settlement and in the full net amount thereof.

"The first question is directly, and the second question is indirectly involved in the case wherein the United States is the appellant, whereas the second question is the only one which is involved in the case wherein John R. Rogers, collector, is the appellant."

The underlying and decisive factor is whether the sum recovered for the infringement of the patent involves capital or income. On that and on all questions raised we find ourselves in accord with the trial Judge. We hold that the patent was the property of
374 the plaintiff; that the infringement thereof was a deprivation of plaintiff's capital, and that the recovery therefor was a replacement of capital and not income.

As the case is thoroughly discussed by the trial judge and as a further opinion by this court would be but a studied effort to recite in changed language what the trial judge has already set forth, we limit ourselves to affirming the cases on Judge Fake's opinion.

A true copy.

Teste:

_____ _____,

*Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

375 In United States Circuit Court of Appeals, for the Third Circuit

No. 5445. October term, 1934

UNITED STATES OF AMERICA, APPELLANT

*vs.*

THE SAFETY CAR HEATING & LIGHTING COMPANY, APPELLEE

*Judgment*

Filed Feb. 26, 1935

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, February 26, 1935.

PER CURIAM,
BUFFINGTON,
*Circuit Judge.*

[File endorsement omitted.]

376 [Clerk's certificate to foregoing transcript omitted in printing.]

377 Supreme Court of the United States

*Order allowing certiorari*

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1935